

## Criminal Justic Citizenship

Daniel S. McConkie, Jr.

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## CRIMINAL JUSTICE CITIZENSHIP

*Daniel S. McConkie, Jr.\**

## Abstract

The American criminal justice system is fundamentally democratic and should reflect an ideal of citizenship that is equal, participatory, and deliberative. Unfortunately, the outcomes of criminal cases are now almost always determined by professionals (prosecutors, defense attorneys, and judges) instead of by juries. This overly bureaucratized system of adjudication silences the voice of the people. A better system would strengthen “criminal justice citizenship,” which refers to the right of the citizenry to participate, directly and indirectly, in the criminal justice system and to deliberate in its workings.

The three key principles of criminal justice citizenship are membership, participation, and deliberation. Membership refers to who can participate and whether they can participate on an equal basis. Where the justice system adheres to this principle, people enjoy a greater sense of belonging, solidarity, and trust in government. Participation refers to public participation in democratic processes, such as jury service. Deliberation refers to structured dialogues between lay persons that affect governmental decisions. Institutions and procedures must be designed to give the people an important role in government, but the nature and extent of that role should be limited by other considerations, such as procedural accuracy and preventing racial discrimination.

This theory of criminal justice citizenship has important applications to jury trials. Regarding membership, providing broad and equal opportunities for jury service is necessary for democratic legitimacy and fair and effective deliberations. Regarding deliberation, jury trials need to be more transparent; the prevailing procedures of jury deliberations need to be modified; and unanimous verdicts must be required to protect the voice of potentially marginalized jurors. Regarding participation, jury trials are so rare that it will be necessary to improve criminal justice citizenship by democratically reforming other aspects of the criminal justice system, such as plea bargaining. The overarching principle is that the people need a more significant role in criminal adjudication, not only

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because popular participation is good for defendants, but also because it strengthens American democracy.

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INTRODUCTION

While the American criminal justice system has made some important substantive and procedural advances in the last century, it has also lost something essential: its local, democratic character. Crucially, the outcomes of criminal cases are now almost always decided by professionals instead of by juries. Scholars have studied this and proposed several ways to give juries a greater role in adjudication.<sup>1</sup> These proposed reforms promise to improve the quality and fairness of criminal justice for defendants, but they may also provide a whole other set of important and insufficiently explored benefits relating to the health of this country’s democracy. Strengthening and expanding the American jury system would help to revitalize “criminal justice citizenship.” Put simply, criminal justice citizenship refers to the rights and privileges of the citizenry to participate directly in some aspects of the criminal justice system and to deliberate in some of its workings. “Citizenry” in this context is defined geographically and not necessarily by reference to immigration law.

The American criminal justice system is supposed to be fundamentally democratic; it should reflect an ideal of citizenship that is equal, participatory, and deliberative. This Article is written from the perspective of the citizens who participate as non-professionals in the courts. Legal scholarship rarely considers the system from their perspective.<sup>2</sup> This is, to a certain extent, understandable because the

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1. See *Democratizing Criminal Justice Symposium*, 111 NW. U. L. REV. 1367 (2017).  
2. But see, e.g., Jenny Carroll, *The Jury As Democracy*, 66 ALA. L. REV. 825, 825 (2015) (exploring “the critical interpretive role the jury plays within the democratic lawmaking body”); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2175 (2014) (describing the essential constitutional role of the criminal court audience in connecting the people to criminal procedure); Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 315–16 (2003) (making the case for jury sentencing based on history, political legitimacy, deliberative democratic theory, and the practicalities of sentencing).

criminal defendant in a given case has a higher stake than anyone in its outcome. But society's interest in the case is also great, and the criminal justice system's purposes go beyond sorting the guilty from the innocent, respecting the rights of the accused, and imposing just punishment. The criminal justice system must also meaningfully reflect self-rule by citizens. That self-rule is central to the identity of the American people; it is foundational to the Constitution that begins with the words "We the People"; and it offers the best hope for a criminal justice system that recognizes the inherent worth of the individual and the centrality of the will of the people in any system that deserves to be called democratic.<sup>3</sup>

This Article's theory of criminal justice citizenship is important because it defines the role that citizens in a democracy ought to have in administering criminal justice. Thus, the theory necessarily straddles the line between legal and political theory: legal theory because it considers the proper administration of criminal justice, and political theory because it argues that criminal justice in a democracy must reflect a meaningful degree of self-rule by citizens. This theory is novel in considering the nature of citizenship in this country's democracy and how that concept ought to apply to criminal justice.

This Article proceeds as follows. Part I provides a brief history of American criminal justice and discusses how the current system stacks up against the normative ideal of democratic criminal justice. The constitutional right to a trial by jury best reflects that ideal, although it has largely disappeared. A group of scholars has recently revived the idea of local, democratic criminal justice.

Part II sets forth a theory of citizenship drawn from political science scholarship, focusing on membership, participation, and deliberation, and applies this to criminal justice generally. Membership refers to who can participate and whether they can participate on an equal basis. Where the criminal justice system adheres to this principle, people enjoy a greater sense of belonging, solidarity, and trust in government. Deliberation refers to structured dialogues between lay persons, the content and conclusions of which affect governmental decisions. Participation refers to public participation in democratic processes, including jury service. Institutions and procedures must be designed to give the people an important role in government, but the nature and extent of that role are limited by other considerations, such as procedural accuracy and preventing racial discrimination.

Part III applies this theory to jury trials. The first key concept is membership. Jury service, when it is inclusive, can broadly distribute membership benefits in society. Citizens should have equal rights to serve

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3. See Jocelyn Simonson, Essay, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 255–56 (2019).

on juries, and all jurors should have an equal voice. When that condition holds, the jury system can strengthen social solidarity, shore up the governmental legitimacy, and help ensure criminal justice outcomes that are fair and impartial.

The second key concept is deliberation. As applied to juries, it reveals the need for many reforms. For example, because the public should be able to deliberate on issues of major importance, it is clear that, when a defendant in a criminal case faces potential deportation, that case is of sufficient public importance that a jury should decide it. Furthermore, because the deliberation process should be transparent to the public, trials should be livestreamed or otherwise made publicly viewable, so that people can gain a greater understanding of specific cases and criminal adjudication generally.

Effective deliberations should be based on reason and a consideration of all views presented. While juries reach the right conclusion most of the time, many reforms are still needed. For example, jurors should be allowed to take notes and ask questions throughout the trial, and the voices of minority and female jurors need to be amplified.

The third key concept is participation. Jury service teaches people hands-on about their own laws and government. Moreover, it helps people work together for a common purpose and forges important social connections. Unfortunately, many people would rather not take the time for jury service. Society needs to give higher compensation to jurors and make their service more convenient. Judges and attorneys need to respect jurors' time by streamlining trials as much as possible. Given the right reforms, the trial jury—even in a system dominated by guilty pleas—can be a strong vehicle for participatory self-government that respects equal rights, promotes social solidarity and democratic legitimacy, and fosters democratic deliberations.

Unfortunately, as plea bargaining has replaced jury trials, the system has become too bureaucratized, and the people have been crowded out. The solution to this has eluded policy makers. Re-enthroning the eighteenth century jury trial is not feasible or even desirable,<sup>4</sup> but merely reforming plea bargaining to make it more fair and accurate for defendants is not enough, either. The people need to have a more significant role in criminal adjudication. The reasons for all this will become clearer as this Article turns, first, to the history of the trial jury, its demise, and the bureaucratic machinery that replaced it.

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4. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 130 (2012).

## I. JURIES, PLEA BARGAINING, AND NON-DEMOCRATIC CRIMINAL JUSTICE

One key feature of the American criminal justice system at the Founding and as envisioned in the Constitution has been its local orientation and democratic character.<sup>5</sup> When left unchecked, it can be a tool of oppression. But another set of pernicious problems can arise when the system strays from its democratic roots.

### A. *Declining Juries and Bureaucratic Criminal Justice*

The trial jury is an excellent example of a criminal procedure designed not only to protect defendants' rights—Colonial Americans trusted their fellow citizens to adjudicate fairly more so than government employees—but also to express and strengthen local citizenship.<sup>6</sup> The Constitution reflected this preference by enshrining the jury right in Article III and the Sixth Amendment.<sup>7</sup> Although modern judges, lawyers, and scholars have typically treated this as a right belonging solely to individual criminal defendants, the right was also originally conceived as belonging primarily to the people.<sup>8</sup>

To describe this lofty theory of the jury trial is not to ignore its downsides. While the local democratic character of Colonial-era juries could be laudable, society would obviously never want to completely replicate that institution in modern times. Colonial trials were quick, relatively informal, and often inaccurate.<sup>9</sup> Blacks, women, and other marginalized groups could hardly hope for fair treatment at any stage of the process.<sup>10</sup> Local criminal justice reflected all the prejudices of the local communities.<sup>11</sup> Then, as now, juries have been known, due to improper biases, to convict the innocent and acquit the guilty.<sup>12</sup> Juries

5. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398–99 (2009).

6. *Id.* at 414 (“In colonial America, decisions on criminal justice—and community governance—trickled up.”).

7. *Id.* at 398 (first citing U.S. CONST. art. III, § 2; and then citing *id.* amend. VI).

8. LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 13 (2015); Appleman, *supra* note 5, at 405, 440; see Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1337–38 (2007); see also ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS* 12, 15 (2013) (explaining that the jury is fundamental to rule by the people).

9. See Appleman, *supra* note 5, at 407.

10. See BIBAS, *supra* note 4, at 130.

11. Appleman, *supra* note 5, at 422–23.

12. Cf. Stephanos Bibas, *Defending the Jury: Crime, Community, and the Constitution*, CRIM. L. & CRIM. JUST. BOOKS (May 2016) (book review), <https://clcjbooks.rutgers.edu/books/defending-the-jury-crime-community-and-the-constitution/> [<https://perma.cc/9REB-KSFG>] (discussing juries' intuitions about punishment).

have other weaknesses: as lay bodies, they can be unable to properly sort through and weigh complicated or scientific evidence; they may also struggle to apply key legal concepts like the presumption of innocence. Finally, a jury has nearly unreviewable discretion to ignore the law in particular cases.<sup>13</sup>

The American criminal justice system should not ignore these problems, nor should it be blinded to the virtues of Colonial juries, which the Colonists considered fairer in adjudicating than any outside body.<sup>14</sup> Since then, the jury has long been considered, at least in theory, a cornerstone of American criminal justice. But since Colonial times, jury trials have almost entirely disappeared and been replaced by plea bargaining.<sup>15</sup> About 97% of federal convictions, and 95% of state convictions, are obtained by guilty pleas.<sup>16</sup> In plea bargaining, defendants waive constitutional rights, such as the right to a jury trial, in exchange for sentencing benefits that they likely would not receive if the case went to trial.<sup>17</sup> This form of non-trial disposition involves significantly less procedural expense than trials and has been embraced by all the system's players.<sup>18</sup>

With the rise of plea bargaining came a different view of who held the right to trial by jury. While judges through the mid-nineteenth century saw the jury trial as a community-based right, later judges came to see it as an individual—and therefore waivable—right.<sup>19</sup> As more and more defendants waived the right, the citizenry was left without its most important constitutional means of participating in criminal adjudication.

The decline of the jury trial has upset the carefully balanced separation of powers that should define the American system.<sup>20</sup> Juries rarely have the opportunity to decide cases, as by acquitting, convicting of the charged or lesser crimes, or even nullifying. Judges rarely choose not to accept plea agreements and have few legal grounds to review

13. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 65–69 (2006).

14. See J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123, 132 (1993).

15. GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH* 1 (2003).

16. Jenia I. Turner, *Plea Bargaining*, in 3 REFORMING CRIMINAL JUSTICE 73, 73 n.2 (Erik Luna ed., 2017).

17. See *id.* at 75–76.

18. See FISHER, *supra* note 15, at 17.

19. See Appleman, *supra* note 5, at 398.

20. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033–34 (2006); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 8 (2017).



prosecutorial charging discretion.<sup>21</sup> The legislature has ceded great power to prosecutors as well, by codifying crimes that prohibit an ever broader swath of human conduct, have ever lower standards of *mens rea* for prosecutors to prove, are effectively inchoate,<sup>22</sup> and have mandatory minimum penalties that greatly reduce judges' and juries' sentencing discretion.<sup>23</sup> Prosecutorial power has ballooned almost unchecked to the point that prosecutors dominate the system.<sup>24</sup> Prosecutors are largely unaccountable to the people; prosecutors' offices set their own priorities and procedures, and citizens have only the blunt mechanism of elections of chief prosecutors to control them.<sup>25</sup> The inner workings of prosecutorial offices, including charging decisions and plea bargaining, are largely concealed from public view, leaving the public even more powerless.<sup>26</sup>

The decline in jury trials has also changed the public's view of them. Most Americans will never have the opportunity to serve on a jury,<sup>27</sup> and this may be turning public attitudes against jury trials.<sup>28</sup> Most people have been persuaded that plea bargaining procedures generally save juries time and the system money.<sup>29</sup> But many members of the public also feel that legal processes are opaque and confusing.<sup>30</sup>

### B. Democratic Criminal Justice

An important critique of plea bargaining is that of over-bureaucratization. Professor Joshua Kleinfeld, interpreting and applying

21. See Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 69 (2015).

22. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 227–30 (2007).

23. McConkie, *supra* note 20, at 8–9. One reason for this vast expansion of new crimes is that legislatures have ceded their power to define crimes to administrative agencies. Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. (forthcoming 2020) (manuscript at 2).

24. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998).

25. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxv–xxviii (2019).

26. See Lynch, *supra* note 24, at 316; Turner, *supra* note 16, at 76.

27. Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 61 (1999).

28. See Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 354–55 (1999).

29. See, e.g., King, *supra* note 27, at 59–60, 67 (discussing incentives to avoid the “expense of trial”).

30. Cf. Arthur L. Burnett, Sr., *Jury Reform for the 21st Century: A Judge's Perspective*, CRIM. JUST., Spring 2005, at 32, 37–39 (describing instructions that should be given to juries to assist them in understanding the law and the process of a trial before the trial begins).

the work of sociologist Max Weber to criminal justice, has defined bureaucracy as “a professionalized corps of officials and experts” that governs through “technical expertise, knowledge, and general rules applied to particular cases.”<sup>31</sup> Bureaucrats govern through instrumental rationality, through which “one identifies an end to be maximized and uses the technical apparatus of government to secure that end as efficiently as possible.”<sup>32</sup> Bureaucracy has become so ubiquitous as to become the defining feature of any modern democracy and even of modernity itself.<sup>33</sup>

Bureaucracy brings certain advantages, such as efficiency, technical accuracy, and the ability to apply predetermined rules to a large number of cases in a theoretically evenhanded manner. For many challenges, the advantages of relying on bureaucracies likely outweigh the disadvantages. For example, one author, Professor Jason Brennan, has recently argued for epistocracy (i.e., rule by the qualified) for scientifically complex and slow-moving crises, like climate change.<sup>34</sup>

It is easy to see how criminal justice might be served by such a philosophy.<sup>35</sup> Criminal justice professionals embody it.<sup>36</sup> Prosecutors try to give the same “deal” for certain common categories of cases, especially for quick dispositions, and defense attorneys and judges are usually quick to come along.<sup>37</sup> This allows them to process more cases more quickly without becoming mired in individual complexities. Prosecutors and judges endeavor to treat like cases alike.<sup>38</sup> Many other experts—from policy makers to parole officers—also provide scientific and technocratic perspectives, which can benefit America’s large and complex criminal justice system.

31. Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1379 (2017) (emphasis omitted).

32. *Id.* at 1379 (noting that “bureaucratic government operates with a distinct conception of what it means to be rational”). See generally Lauren M. Ouziel, *Democracy, Bureaucracy and Criminal Justice Reform*, 61 B.C. L. REV. 523 (2019) (discussing differing views of rationality of criminal justice that exist within the bureaucracy).

33. See Kleinfeld, *supra* note 31, at 1379.

34. See Adam Tooze, *Democracy and Its Discontents*, N.Y. REV. BOOKS (June 6, 2019) (citing JASON BRENNAN, *AGAINST DEMOCRACY* (2016)), <https://www.nybooks.com/articles/2019/06/06/democracy-and-its-discontents/> [<https://perma.cc/Q6L7-WKL4>].

35. See John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. (forthcoming 2020) (manuscript at 6–7) (arguing for diminished lay participation in criminal justice and increased expert dominance).

36. See Kleinfeld, *supra* note 31, at 1396.

37. See Rappaport, *supra* note 35 (manuscript at 17–18) (“[M]ass-produced [plea] bargains short-circuit elaborate constitutional procedures . . .” (second alteration in original) (quoting BIBAS, *supra* note 4, at xvi)).

38. See *id.*

Notwithstanding all this, bureaucracy has its downsides. First, it is fundamentally non-democratic. Bureaucrats are only indirectly accountable to the people.<sup>39</sup> Their processes are opaque and difficult for lay people to understand. One author has argued that the modern bureaucracy itself is a “slow-moving existential challenge[]” against which American democracy is ill-equipped to resist.<sup>40</sup> Although democracy requires some bureaucracy, it must also put in place counterweights to bureaucratic forces, “pockets of resistance” where outsiders to the bureaucracy can express their values and participate in important processes.<sup>41</sup>

Second, bureaucracies do not do well at weighing competing values, like justice and mercy, in individual cases. Weber called this “value rationality” (the opposite of value instrumentality), which Kleinfeld understood to mean making decisions “by consciously considering which course of action best coheres with one’s own or the community’s ethos, norms, or values, typically through attention to concrete particulars or a concrete balancing of interests.”<sup>42</sup> The common law method is based on “concrete balancing of interests” and specializes in “concrete ethical or other practical valuations.”<sup>43</sup> But many prosecutors avoid this kind of case-specific, local value-oriented thinking because it slows down the “mill.”<sup>44</sup> Furthermore, there is reason to be suspicious about whether prosecutors, or any other professional criminal justice actors, are better than the laity at certain kinds of decisions. Representative bodies of citizens may do a better job, in some contexts, of representing community values and equitably balancing competing interests. This would effectively broaden the meaning of the term “expert” to include experts in local values and conditions from the perspective of those who are directly affected by, and interested in, criminal justice.<sup>45</sup> In summary, Kleinfeld argues that the root of America’s criminal justice crisis “is a set of bureaucratic attitudes, structures, and incentives divorced from the American public’s concerns and sense of justice.”<sup>46</sup>

39. See Kleinfeld, *supra* note 31, at 1382.

40. Tooze, *supra* note 34 (reviewing David Runciman’s book *How Democracy Ends*, a work arguing that “[d]emocracy has no clear answer for the mindless operation of bureaucratic and technological power”).

41. Kleinfeld, *supra* note 31, at 1383.

42. *Id.* at 1379.

43. *Id.* at 1381 (quoting MAX WEBER, *ECONOMY AND SOCIETY* 891, 976 (Guenther Ross & Claus Wittich eds. & trans., Univ. of Cal. Press 1978) (1922)).

44. See Rappaport, *supra* note 35 (manuscript at 17–18).

45. See Jocelyn Simonson, *Power over Policing*, BOSTON REV. (June 8, 2020), <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing> [https://perma.cc/QWS5-JWTZ] (calling for shifting power from the police to communities).

46. Kleinfeld, *supra* note 31, at 1376.

For this reason, Kleinfeld proposes that the system “preserve pockets of nonbureaucratic reason and authority”—such as juries.<sup>47</sup> He and a group of other scholars recently proposed a solution to the divorce of criminal justice from public concern and participation: “[M]ake criminal justice more community focused and responsive to lay influences.”<sup>48</sup> In other words, the system must become less bureaucratic and more democratic. According to Kleinfeld, the American criminal justice system should “reflect and respond to the ethical life” of the citizenry.<sup>49</sup> “Ethical life” refers to “the values disclosed by a community’s public deliberations or implicit in its social practices and institutions, provided those deliberations, practices, and institutions reflect or were formed in reasonably non-oppressive conditions.”<sup>50</sup> Kleinfeld proposes that the criminal justice system “should be so structured that lay citizens take part in it and see their sense of justice at work in it, rather than left wholly to” the bureaucracy.<sup>51</sup>

To this end, scholars have put forth many concrete proposals to democratize criminal justice at every stage of the process, including adjudication proposals.<sup>52</sup> These proposals have merit; while their potential benefits for criminal defendants are important, scholars have not yet closely examined how these proposals relate to, affect, and strengthen citizenship. The concept of criminal justice citizenship considers the public’s appropriate role in criminal justice and the benefits that may accrue (in addition to procedural accuracy and fairness to defendants) when this concept reassumes its fundamental place in American criminal justice.

One key point that citizenship theory illuminates about Kleinfeld’s critique of bureaucracy is the destructive effect of racism in criminal justice. Kleinfeld calls over-bureaucratization the root of America’s criminal justice crisis,<sup>53</sup> but racism is indisputably also at the root.<sup>54</sup> Although democracy can effectively counteract bureaucracy, racism has long thrived under both orders. Thus, any proposed reform of criminal justice that fails to address inequality will fall far short.<sup>55</sup> Criminal justice citizenship, as will be seen below, has equality and democracy at its heart.

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47. *Id.* at 1381.

48. *Id.* at 1376.

49. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1466 (2017).

50. *Id.*

51. *Id.* at 1457.

52. See, e.g., Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1693, 1701 (2017) (presenting thirty proposals for reform).

53. See *supra* text accompanying note 46.

54. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 1–2 (rev. ed. 2012).

55. The Author is indebted to his colleague, Brandon Evans, for this insight.

## II. CRIMINAL JUSTICE CITIZENSHIP

Much of the scholarship about the American criminal justice system focuses on the rights of the accused. Other scholars have examined the institutions that should safeguard these rights, such as the police, prosecutors, judges, and juries. Less commonly addressed, however, is the question of how these public functions fit into a democratic order and what role ordinary citizens should play in them. Any proposed criminal justice reform should not only help make the process fairer for criminal defendants, but also allow for the exercise of citizenship to the extent practicable in that context, recognizing that not all popular participation necessarily serves the public good.

Common dictionary definitions of “citizen” and “citizenship” show three popular yet divergent understandings of the terms. First, sometimes “citizen” refers simply to “inhabitant.”<sup>56</sup> Second, a citizen is a “member of a state” who owes allegiance and is entitled to protection, or in other words, that has both rights and duties.<sup>57</sup> A third sense has to do with “the quality of an individual’s response to membership in a community,”<sup>58</sup> as in Maya Angelou’s statement about the meaning of life: “I have a feeling that I make a very good friend, and I’m a good mother, and a good sister, and a good citizen. I am involved in life itself—all of it. And I have a lot of energy and a lot of nerve.”<sup>59</sup> This Article uses the term consistently with all three of those meanings, although it emphasizes the political. This Article focuses on citizenship in the United States (including states and localities), which is a distinct product of its history, legal tradition, and Constitution. Even still, the discussion that follows is more normative than descriptive.<sup>60</sup>

Citizenship is the basis of America’s political (and thus, to an extent, social) order. In the joint enterprise of self-government, it encompasses

56. *Citizen*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/citizen> [<https://perma.cc/P7SJ-2TE6>]. This definition often connotes entitlement to certain rights and privileges. *Id.*

57. *Id.*

58. *Citizenship*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/citizenship> [<https://perma.cc/7GVV-2Q3M>].

59. Marianne Schnall, *Exclusive Interview with Maya Angelou on Her New Book, Mom & Me & Mom*, HUFFINGTON POST (May 10, 2013, 9:23 AM), [https://www.huffpost.com/entry/maya-angelou-mothers-day-book\\_b\\_3202362](https://www.huffpost.com/entry/maya-angelou-mothers-day-book_b_3202362) [<https://perma.cc/2FUK-H8U2>] (last updated Dec. 6, 2017); see also Theodore Roosevelt, *The Duties of American Citizenship* (Jan. 26, 1883), <https://glc.yale.edu/duties-american-citizenship> [<https://perma.cc/A63P-YEXX>] (“The first duty of an American citizen, then, is that he shall work in politics; his second duty is that he shall do that work in a practical manner; and his third is that it shall be done in accord with the highest principles of honor and justice.”).

60. One descriptive definition of American citizenship is simply “a shared set of expectations about the citizen’s role in politics.” Russell J. Dalton, *Citizenship Norms and the Expansion of Political Participation*, 56 POL. STUD. 76, 78 (2008) (emphasis omitted).

the people's rights and freedoms, duties and responsibilities, and relationships to each other. Political scientists have demonstrated that democratic citizenship is based on three closely related key concepts:

- (1) **Membership.** This refers formally to who is a citizen and who is not, but the quality of membership varies by degrees. (Formerly incarcerated persons, for example, may have legal limits on their abilities to act as citizens; furthermore, they are often stigmatized.) These questions require consideration of the related concepts of civic equality (including equal rights and duties), a sense of belonging, solidarity (shared commitment to social order), and legitimacy (acceptance of state authority).
- (2) **Participation.** This refers to public participation in democratic processes, such as jury service and voting.
- (3) **Deliberation.** This refers to three related concepts: participation in democratic deliberations (as by speaking and listening), becoming sufficiently informed about the issues, and understanding others' views.<sup>61</sup>

Criminal justice citizenship connects these three principles of citizenship to criminal justice and considers their application to specific contexts. Thus, a criminal justice citizen is anyone in a jurisdiction (municipal, state, or federal) who has membership there, meaning that she is subject to its criminal laws and its processes and is protected, at least theoretically, by those laws and processes; a criminal justice citizen is able, through participation or deliberation, to exert influence over those laws and processes. We the People are all criminal justice citizens. The question is, in what contexts and to what extent is the common good served by popular participation in criminal justice? This Article wrestles with these issues in the context of the jury trial.

The link between citizenship and criminal justice is under-examined.<sup>62</sup> Rather, scholars have focused more attention on the link between citizenship and democracy<sup>63</sup> and between democracy and the criminal justice system.<sup>64</sup> This is unfortunate because citizenship describes a critical, distinctive, and historical aspect of American democracy from the perspective of those who participate. Without a clear

61. See, e.g., RICHARD BELLAMY, *CITIZENSHIP* 12 (2008); Dalton, *supra* note 60, at 78–79.

62. But see *DEMOCRATIC THEORY AND MASS INCARCERATION* (Albert W. Dzur et al. eds., 2016) (providing a collection of essays discussing democratic participation in criminal justice).

63. Political scientists have taken a much greater interest in this than legal academics. See, e.g., *COMMUNITY AS THE MATERIAL BASIS OF CITIZENSHIP* (Rodolfo Rosales ed., 2017); BARBARA CRUIKSHANK, *THE WILL TO EMPOWER* (1999); CLIFF ZUKIN ET AL., *A NEW ENGAGEMENT?: POLITICAL PARTICIPATION, CIVIC LIFE, AND THE CHANGING AMERICAN CITIZEN* (2006).

64. See, e.g., *Democratizing Criminal Justice Symposium*, *supra* note 1.

understanding of how citizenship relates to America's criminal justice system, any understanding of that system is impoverished. This leads to the danger of assuming (1) that the criminal justice system, without significant democratic elements, actually represents the will of the people; (2) that the criminal justice system can properly and legitimately function without effective mechanisms for the people to meaningfully chart its course and even to operate it in appropriate circumstances; and (3) that a citizenry that does not participate in the criminal justice system will have strong "habits of freedom," such as participation in politics, deliberation, and the desire to seek the common good,<sup>65</sup> necessary to a healthy democratic society. Thus, criminal justice citizenship, comprising principles of membership, participation, and deliberation, should be considered integral to criminal justice in American democracy.

### A. Membership

Membership, the first ideal of citizenship, generally refers to one's belonging to the political community as an equal and having a sense of that belonging.<sup>66</sup> It also requires a commitment to a particular social order, including solidarity with other citizens and a belief that the government is legitimate.<sup>67</sup> As applied to criminal justice citizenship, membership is an important criterion for judging the current system or any proposed reforms. For example, popular participation as a democratic practice must not overpower the imperative of equal protection under the law.

### 1. Equality

Membership implies equality. Citizenship requires "a condition of civic equality" and "consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis."<sup>68</sup> One way to measure civic equality is the "eyeball test," which holds that citizens must be willing and able to "look others in the eye without reason for the fear or deference that a power of interference

65. See Yuval Levin, *Taking the Long Way: Disciplines of the Soul Are the Basis of a Liberal Society*, FIRST THINGS, Oct. 2014, at 25, 30.

66. See BELLAMY, *supra* note 61, at 52.

67. See *infra* Section II.A.3.

68. BELLAMY, *supra* note 61, at 17 ("This status not only secures equal rights to the enjoyment of the collective goods provided by the political association but also involves equal duties to promote and sustain them . . ."); see also Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL'Y REV. 335, 339 (2009) (discussing theoretical perspectives on citizenship, membership, and belonging).

might inspire.”<sup>69</sup> Ideally, this civic equality is a necessary precondition for citizenship.

In practice, of course, Americans’ ability to participate or deliberate as criminal justice citizens is not equally distributed. For example, aliens and felons generally cannot vote or serve on juries.<sup>70</sup> Still, they have other opportunities to participate, as by speaking out in public forums. More broadly, people of color, poor people, and people with less education are less likely to participate in any way in the criminal justice system.<sup>71</sup> This asymmetry arises from social inequality and can be expected to skew the benefits of criminal justice citizenship away from the less privileged and in favor of those who can and do participate. Thus, criminal justice citizenship requires the justice system to be actively inclusive in the participation it seeks.

The American conception of equality in citizenship draws heavily from Ancient Rome.<sup>72</sup> Roman citizenship centered on equality under the law.<sup>73</sup> The Roman Republic was characterized by competing classes, and it institutionalized a system of checks and balances to restrain them.<sup>74</sup> Citizens participated so that their self-interests and group interests could be weighed more heavily in the balances against those of competing groups.<sup>75</sup> It was thought that the public interest would emerge from such a system.<sup>76</sup> Modern theories of citizenship have likewise drawn on this model of balancing competing group interests.<sup>77</sup> Nevertheless, one criticism of Roman citizenship is that it had an “instrumental,” or selfish, character, in contrast to “the Greek ideal of disinterested service to the public good.”<sup>78</sup>

Citizens in a democracy must view each other as moral equals. Moral equality does not imply that citizens value the conduct or opinions of others as equal to their own but rather that they actually view each other as fundamentally equal before the law, deserving of its protection, and

69. R.A. Duff & S.E. Marshall, *Civic Punishment*, in *DEMOCRATIC THEORY AND MASS INCARCERATION*, *supra* note 62, at 33, 35 (quoting PHILIP PETTIT, *ON THE PEOPLE’S TERMS* 84 (2012)).

70. *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 279 (2007) (“The most obvious way in which mass incarceration bars black democratic participation is the impact of felon disenfranchisement.”).

71. *See id.* at 282.

72. *See* BELLAMY, *supra* note 61, at 38.

73. *See id.* at 34–35.

74. *See id.* at 35–38.

75. *Id.* at 38.

76. *Id.*

77. *See id.*

78. *Id.* at 36–38; *see infra* Section II.B.1.



comprising an integral part of the polity.<sup>79</sup> This is related to but distinct from formal legal equality, which can be enshrined in the law and even enforced, to some extent, by the state. A widely held conception of moral equality is necessary to citizenship because citizens who do not believe that those belonging to less powerful groups are of equal moral worth might, by their deliberations and participation, erode that equality. (Think racist juries or racist electorates, for example.) This marginalizes certain groups to the detriment of the democracy for which many Americans strive.<sup>80</sup>

Furthermore, equality on the local level is a key concern of criminal justice citizenship. Because local officials handle most criminal cases, most opportunities for citizens to participate in criminal justice are local, too. Therefore, this Article focuses on local citizenship.<sup>81</sup> In a very large and diverse society, local criminal justice promotes citizenship. It is generally easier for a smaller group of people to work out solutions to their own problems than a much larger group. A locality can provide many opportunities for its citizens to participate in government, to deliberate together, to listen to each other, and to consider each other's interests.<sup>82</sup> In a smaller locality, there will typically be a narrower range of disputes and acceptable solutions.<sup>83</sup> The flip side is, as the history of the Civil Rights Movement demonstrates, that the national government must guarantee a baseline of civil rights.<sup>84</sup>

It is true that people often think of citizenship as U.S. citizenship.<sup>85</sup> But even non-U.S. citizens are criminal justice citizens where they live. The criminal justice system, with its close ties to the machinery of deportation, has an outsized impact in their communities. Non-U.S. citizens have a few ways, albeit limited, to participate, such as by

79. Cf. BELLAMY, *supra* note 61, at 105 (arguing that a referendum fails to meet the standard of citizenship if the referendum does not encourage "participants to view each other as equals").

80. See *id.* at 96. President George Washington warned against "the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the sacred ties" that unite us. George Washington, President, U.S., Farewell Address (Sept. 19, 1796), <https://founders.archives.gov/documents/Washington/99-01-02-00963> [<https://perma.cc/5YA5-CZBK>]. Of course, though Washington eloquently articulated this ideal, he was a slaveholder who did not fully comprehend it.

81. For a discussion of local citizenship, see Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573, 574 (2010). "[T]he concept of citizenship as one only bounded by national borders has long given way to the recognition that there are other places—both outside and within the nation-state—where citizenship is also located." *Id.*

82. Of course, every locality does it differently, and some do it better than others.

83. BELLAMY, *supra* note 61, at 104.

84. See *id.* at 79.

85. See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

engaging in political protests or deliberating in community councils. Because they should be equally protected by the criminal law and its processes, non-U.S. citizens should have expanded opportunities to participate.<sup>86</sup>

## 2. Belonging and Feeling of Belonging

Membership depends on more than actually belonging to the group. It also depends on a feeling of belonging, a sense of inclusion in the larger society, such that one's voice is considered and one's participation makes a difference. Where people lack this sense of inclusion, they may be less likely to participate.<sup>87</sup> For example, marginalized groups are less likely to vote or serve on a jury than those that are not marginalized.<sup>88</sup>

Nevertheless, there may be good reasons to exclude someone from certain privileges. A few examples might include not letting sixteen-year-olds or incarcerated felons vote. A more controversial example is excluding certain groups from juries for cause, like those who distrust all police or categorically oppose the death penalty. Whenever a group is excluded from participation, there is a social cost. Although such instances may sometimes be unavoidable, care must be taken so that those who are excluded in one context still have and are aware of substantial opportunities to participate in other ways.

## 3. Solidarity

Membership requires sufficient solidarity among the citizenry to create a sense of a "shared civic project." People who self-identify as citizens of a particular jurisdiction may "increasingly view the well-being of the [polity] as central to their own identity and work on behalf of the

86. Cf. Chloe Veltman & Vanessa Rancano, *Noncitizens Allowed to Vote in S.F. School Board Election, but Few Will*, KQED NEWS (Nov. 6, 2018, 10:30 AM), <https://www.kqed.org/news/11680868/voter-registration-for-non-citizens-begins-in-s-f-school-board-election> [<https://perma.cc/2CC5-G3KX>] ("San Francisco became the largest city in the United States to allow noncitizens to vote in a local election today—but few newly enfranchised residents were ready to take the city up on the offer.").

87. See, e.g., LEONIE HUDDY ET AL., *THE OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY* 739 (2013); Univ. Ctr. for the Advancement of Teaching, *Sense of Belonging in the College Classroom*, OHIO ST. U., <https://ucat.osu.edu/bookshelf/teaching-topics/shaping-a-positive-learning-environment/sense-of-belonging-in-the-college-classroom/> [<https://perma.cc/R2EG-KQJY>] (explaining that college students who lack a feeling of belonging are less likely to participate in class).

88. See HUDDY ET AL., *supra* note 87, at 745; Nacente S. Seabury, *Diversity Matters: Confronting Implicit Bias with Jury Diversity*, A.B.A. (Aug. 28, 2016), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2016/diversity-matters-confronting-implicit-bias-jury-diversity/> [<https://perma.cc/S8LW-PY76>]. Although jury service is technically compulsory, it is well-known that there are ways to get out of it.

[polity].”<sup>89</sup> A common cause unifies the citizenry and helps it work together.<sup>90</sup> Critics rightly fear an oppressive, all-embracing communitarianism, but social solidarity does not require this. As Professor R.A. Duff argued,

[T]he civic enterprise is just one of many communities, one of many forms of life, that structure our lives: its scope and reach is limited, partly because a central feature of that form of life in a liberal republic is its emphasis on individual freedom and the privacy that it requires.<sup>91</sup>

Ancient Athenians, at least as modern society idealizes them, enjoyed solidarity in their small, homogeneous society. The citizens of Athens enjoyed “civic friendship”: they knew each other, shared common values and interests, and could agree on civic matters.<sup>92</sup> This is obviously not replicable in modern society. Indeed, it did not actually exist in Athens, where women, slaves, and outsiders were treated deplorably.<sup>93</sup> Still, some basic agreement about major issues is necessary in a democracy, and this limited solidarity seems more achievable on the local level. Citizens who know each other personally and interact in many contexts are more likely to tolerate each other’s differences and even take them into account in policy making.<sup>94</sup>

In America, the Constitution is a major source of political solidarity, setting ground rules upon which society must agree.<sup>95</sup> Its preamble expresses unity (“We the People . . .”) and shared purposes, such as peace,

89. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 544 (2014).

90. See BELLAMY, *supra* note 61, at 34.

91. R.A. Duff, *A Criminal Law for Citizens*, 14 THEORETICAL CRIMINOLOGY 293, 301 (2010).

92. BELLAMY, *supra* note 61, at 34.

93. See SARAH B. POMEROY ET AL., *ANCIENT GREECE: A POLITICAL, SOCIAL, AND CULTURAL HISTORY* 118–20, 382 (4th ed. 2018).

94. See, e.g., EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION* 47, 50 (2010), <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection> [<https://perma.cc/5XJN-KFCS>]; *supra* text accompanying note 90; see also BELLAMY, *supra* note 61, at 34 (stating that Greek citizens took each other’s concerns into account in public decision-making).

95. See Amy Chua & Jed Rubenfeld, *The Threat of Tribalism*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/the-threat-of-tribalism/568342/> [<https://perma.cc/N2PV-ECLU>]; see also Kleinfeld, *supra* note 49, at 1459 n.6 (explaining John Rawls’s argument that, in a liberal society, “all [citizens] affirm the political conception of a constitutional regime” (quoting JOHN RAWLS, *POLITICAL LIBERALISM*, at xviii (1993))). Of course, the Constitution itself is up for debate and can be amended, but only with great difficulty.

justice, and advancing the general welfare.<sup>96</sup> However, citizenship, as it is lived out, is much more personal than law can dictate. Citizenship encompasses social relationships, and the way people think about each other and treat each other is not solely dependent on law. Solidarity cannot be imposed by higher authorities; it has to be felt on the grassroots level. The culture and character of the people in a particular jurisdiction, the way they see each other and treat each other, are all reflected in their political activities and their exercise of citizenship.<sup>97</sup> For example, these cultural characteristics manifest in any jury that happens to be formed, and prosecutors and defense attorneys take them into account throughout the case and in jury selection.<sup>98</sup> The same could be said for how culture and character influence how citizens cast their ballots.

Solidarity is an important concept in criminal justice. At its best, the criminal law represents a common enterprise based on shared values. Those who act out against those values should be dealt with but not permanently excluded (except perhaps in the most egregious cases) from the polity.<sup>99</sup> Criminal law is not simply Us administering justice to Them; it is Us administering justice to Ourselves.<sup>100</sup> Punishment should aim to preserve, to the extent possible, the offender's civic standing and reintegrate the offender—a fellow citizen—into the polity.<sup>101</sup>

#### 4. Legitimacy

Finally, membership must include recognizing the government's legitimacy as a center of power and "broad acceptance of the legitimacy of the prevailing rules of politics."<sup>102</sup> Citizens are more likely to view law as legitimate if it reflects the will of the people in some meaningful way, and if its burdens and benefits are equitably distributed. Citizens who are

96. U.S. CONST. pmbl. ("We the People of the United States, in Order to [1] *form a more perfect Union*, [2] *establish Justice*, [3] *insure domestic Tranquility*, [4] *provide for the common defence*, [5] *promote the general Welfare*, and [6] *secure the Blessings of Liberty to ourselves and our Posterity*, do ordain and establish this Constitution for the United States of America." (emphasis added)).

97. See Dalton, *supra* note 60, at 79 (defining citizenship more broadly to include one's relationship with others in the polity and an ethical and moral responsibility toward them).

98. See, e.g., John Kifner, *Bronx Juries: A Defense Dream, a Prosecution Nightmare*, N.Y. TIMES, Dec. 5, 1988, § B, at 1 (explaining that an "overwhelmingly black and Hispanic" jury in the Bronx is likely to have a different relationship with police officers than a white jury in Westchester).

99. See Duff, *supra* note 91, at 301.

100. See *id.* at 302 ("[W]e must ask not what kinds of punishment 'we' should impose on 'them', [sic] but what kinds of punishment we should impose on ourselves . . .").

101. *Id.* at 302–03.

102. BELLAMY, *supra* note 61, at 13 ("[T]he nature of that participation and the capabilities it calls for have varied over time and remain matters of debate.").

the law's "agents, not merely its obedient subjects," will respect the law and be willing to play an active role in the civic enterprise.<sup>103</sup>

As applied to the criminal justice system, legitimacy is critical because there is evidence to suggest that "the perceived legitimacy of the source of authority may be more significant to [citizens' decisions to comply with the law]—and, thus, to the legal system's ability to control crime—than to the penalties imposed for non-compliance."<sup>104</sup> Furthermore, people must perceive that the justice system is accurate if it is "to command the respect and confidence of the community."<sup>105</sup>

Lastly, participation brings increased legitimacy.<sup>106</sup> The general public already generally trusts career government agency employees as a group<sup>107</sup> including criminal justice professionals. (However, Blacks are much less likely to trust the police than non-Hispanic Whites.)<sup>108</sup> But when lay people participate in the criminal process, they believe it is even fairer.<sup>109</sup>

### B. Participation

Participation refers to self-government or government by the people.<sup>110</sup> Participation builds on membership because citizens must be able to define and determine the terms of social cooperation on an equal basis.<sup>111</sup>

103. Duff & Marshall, *supra* note 69, at 36.

104. Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 163 (2011). Professor Tom Tyler has written extensively about concern for "procedural justice" and people's perception of whether criminal procedures are fair. *See id.* at 162 (citing Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663–64 (2007)). This perception depends on whether they are able to present their own case and have a voice in the process; whether they perceive the adjudicator to be neutral, that is, applying legal principles consistently to the facts of the case; "whether they are treated with dignity and politeness"; and the cues they can discern about the intentions of the authorities. *Id.*

105. *In re Winship*, 397 U.S. 358, 364 (1970).

106. *See* Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 949 (2006).

107. *How Americans See Problems of Trust*, PEW RES. CTR. (July 22, 2019), <https://www.people-press.org/2019/07/22/how-americans-see-problems-of-trust/> [<https://perma.cc/254J-GSXX>]. About 61% of survey respondents had "at least a fair amount of confidence in these individuals to act in the best interests of the public." *Id.*

108. *Id.*

109. Bibas, *supra* note 106, at 929 & n.75.

110. Kleinfeld, *supra* note 31, at 1390; *see also* Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 726–33 (2001) (describing the theory of participatory democracy).

111. *See* BELLAMY, *supra* note 61, at 16–17.

## 1. The History and Theory of American Citizenship

American citizenship can be traced back even further than Ancient Rome, to the Ancient Greeks and classical republicanism. The word “democracy” itself comes from Greek roots meaning “people” and “rule.”<sup>112</sup> For the Greeks, democracy meant that citizens participated fully in government. The Greeks’ emphasis on participation contrasts sharply with Roman citizenship, which focused on equality.<sup>113</sup> Aristotle argued that a person could not attain his full potential outside the polis.<sup>114</sup> Citizenship was strictly limited to free males, and their duties included serving on juries, on local assemblies and councils, and in the military.<sup>115</sup>

As with Ancient Rome, moderns can find plenty to criticize about Ancient Greece. Athens was doubly oppressive: first, it was built on the backs of women, slaves, and non-citizens; and second, it subordinated all private interests to those of the state.<sup>116</sup> Still, it is indisputable that citizens in ancient Athens exercised a great degree of self-government. Furthermore, this ideal greatly influenced the Founding Fathers.<sup>117</sup>

Civic participation in American society has some roots in another Roman ideal, the classical republican conception of the common good.<sup>118</sup> Republicanism requires active participation in civic affairs and putting the common good ahead of personal interests.<sup>119</sup> Many of the Founders spoke in republican terms. For example, in Federalist no.10, James Madison argued that a republican system of government “refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”<sup>120</sup> In other

112. *Id.* at 98.

113. *Id.* at 38–39.

114. *Id.* at 31.

115. *Id.* at 31–33.

116. *Id.* at 35.

117. See THOMAS PAINE, RIGHTS OF MAN 32–33 (London, W.T. Sherman 1817) (“What Athens was in miniature, America will be in magnitude.”).

118. See FERGUSON, *supra* note 8, at 66–68. This is not the only idea of the American Founding but it was an important one. See *id.* at 67–68; see also Paul Meany, *Why the Founding Fathers Loved Ancient Rome*, MEDIUM (Oct. 30, 2018), <https://medium.com/s/story/romes-heroes-and-america-s-founding-fathers-6dada32a8885> [<https://perma.cc/U5W4-TQJB>] (discussing how Cicero and Cato inspired the Founding Fathers).

119. See FERGUSON, *supra* note 8, at 67 (describing Thomas Paine’s understanding of republicanism); see also *Republicanism*, STAN. ENCYCLOPEDIA PHIL. (June 4, 2018), <https://plato.stanford.edu/entries/republicanism/> [<https://perma.cc/PS8E-AUL3>] (discussing writers who emphasize the need for civic virtue and political participation).

120. FERGUSON, *supra* note 8, at 70 (quoting THE FEDERALIST NO. 10 (James Madison)).

words, citizens who participated in government<sup>121</sup> with the greater good in mind could democratically represent the best interests of the people without trampling minority rights.<sup>122</sup>

Similarly, the common good is an important theme of the Constitution.<sup>123</sup> The Preamble's first words are "We the People," and its purposes include "secur[ing] the Blessings of Liberty to ourselves and our Posterity."<sup>124</sup> Furthermore, the Constitution created many connecting points of civic life intended to network the people physically, economically, and socially. These included regulation of interstate and international commerce, a common currency, post offices and post roads, the collection of taxes, a common military defense, and uniform bankruptcy laws.<sup>125</sup> The jury was, and still is, another one of those connecting points.<sup>126</sup>

Citizens in America today still have many ways to participate in the connecting points of civic life. Perhaps the key feature of democratic participation is voting in regular elections decided by a majority.<sup>127</sup> There are many other ways to serve, like sitting on a jury, participating in advisory boards, running for elected office, paying taxes, giving military service, working for the public sector, engaging in political protests, and performing community service. Former General Stanley McChrystal has advocated a year of compulsory national service for young people ages eighteen through twenty-eight to invigorate citizenship and foster greater social cohesion, arguing that "[c]ivic participation grants a sense of ownership to citizens."<sup>128</sup>

In his farewell speech on January 10, 2017, President Barack Obama argued that the Constitution is a dead letter without the people's participation and that the most important office in a democracy is that of

121. Madison was referring to legislators, but part of what he said can also apply to jurors.

122. See PHILIP PETTIT, *REPUBLICANISM* 262 (1997); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1554 (1988); see also Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 *U. PA. L. REV.* 801, 804 (1993) (arguing that no one group of citizens, including a group of experts, can be trusted with government forever).

123. FERGUSON, *supra* note 8, at 69.

124. U.S. CONST. pmbl.

125. FERGUSON, *supra* note 8, at 70–72.

126. *Id.* at 72.

127. BELLAMY, *supra* note 61, at 109. The United States has never fully embraced the seemingly obvious principle that these elections should also be based on the principle of one person, one vote.

128. Stanley McChrystal, *Securing the American Character*, *DEMOCRACY J.* (2014), <https://democracyjournal.org/magazine/33/securing-the-american-character/> [<https://perma.cc/F487-NBPR>].

the citizen.<sup>129</sup> He spoke of the need to rebuild democratic institutions and argued that doing so:

[D]epends on our participation; on each of us accepting the responsibility of citizenship . . . .

Our Constitution is a remarkable, beautiful gift. But it's really just a piece of parchment. It has no power on its own. We, the people, give it power. We, the people, give it meaning[] [w]ith our participation . . . .<sup>130</sup>

Similarly, Supreme Court Justice Steven Breyer has argued that “the Constitution’s efforts to create democratic political institutions mean little unless the public participates in American political life.”<sup>131</sup>

Discourse about American citizenship tends to favor individual rights, which can be defined as entitlements or individual claims that are made upon others or the government.<sup>132</sup> Likewise, criminal justice scholars have focused on the rights of the accused.<sup>133</sup> But one point that is not often made is that rights must be “constructed and sustained by the activities of citizens.”<sup>134</sup> The strength of citizenship and its associated rights depends on the degree to which citizens “regard themselves as involved in shaping their relationships with each other and the state through their ability to influence the rules, policies, and politicians that govern social life.”<sup>135</sup> In other words, in the American system, rights, participation, and membership must go together. Rights are not self-executing or solely dependent upon government officials and bureaucrats: they can only flourish amidst general conditions of equality, solidarity, and mass participation in government.<sup>136</sup>

In spite of citizen participation’s key role in sustaining America’s criminal justice system, it is much less examined than rights, at least in the law reviews. There are many ways that citizens currently participate in criminal justice, and reformers are working to expand the avenues for doing so. Some are direct and powerful (e.g., jury service); others are

129. Barack Obama, President, U.S., Farewell Address (Jan. 10, 2017), <https://obamawhitehouse.archives.gov/farewell> [<https://perma.cc/M9FZ-7WDA>].

130. *Id.*

131. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 215 (2010).

132. *See* BELLAMY, *supra* note 61, at 14.

133. *See, e.g.,* Duff & Marshall, *supra* note 69, at 38–39 (“[A]n important dimension of the criminal law . . . in a democratic republic, [is that] citizens will be active participants in the civic enterprise, including the enterprise of criminal law.”).

134. BELLAMY, *supra* note 61, at 25.

135. *Id.*

136. *See id.*



more indirect but still promise important benefits (e.g., advisory boards to police and prosecutors).<sup>137</sup>

Some may object that in a modern and complex society, turning over a function so important and difficult to the laity is unwise. Why should criminal justice be designated as one of the rare pockets of resistance to the bureaucracy?<sup>138</sup> In the first place, citizens consistently “show passionate interest in how insiders handle it.”<sup>139</sup> This makes participation in criminal justice a matter of democratic legitimacy. Relatedly, the stakes of criminal justice are unusually high and personal, both for defendants and society.<sup>140</sup> Crime represents a tearing of the social fabric, and it affects everyone in some way. Consequently, the system should help to re-stitch the social fabric, benefitting not just defendants or victims but also the larger community. Second, as previously discussed, non-professional citizens are more likely to employ value rationality than instrumental rationality in criminal justice, and a certain measure of this is beneficial.<sup>141</sup> Third, as previously discussed, public participation in criminal justice is inherent and essential to America’s constitutional order.<sup>142</sup>

## 2. Benefits of Participation

Citizens can expect to enjoy several benefits from their participation in government, including denser social networks (referred to as social capital), shared legal and ethical standards, and firsthand knowledge of the workings of government.

### i. Social and Individual Benefits

Where citizens participate in the machinery of government, they have opportunities to create and strengthen relationships with their fellow citizens, whether they volunteer in the community or at the polls or serve on a jury or advisory board. The theory of social capital describes the

137. The key issue in communitarianism is representation. See David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583, 590 & n.30 (1990) (“Even with decentralization and increased localism, our world, as opposed to earlier worlds or utopian ones, cannot be restructured to allow meaningful direct participation.”).

138. See Kleinfeld, *supra* note 31, at 1383.

139. Bibas, *supra* note 109, at 915 & n.9 (describing rational apathy as voter indifference toward becoming informed or voting in general because it is unlikely that doing so would personally benefit the voter).

140. *Id.* at 915.

141. See *supra* Section I.B.

142. See, e.g., U.S. CONST. art. III, § 2 (giving citizens the right to a trial by jury); *id.* amend. VI (same). But see Bibas, *supra* note 109, at 915 (describing victims, witnesses, and citizens as having few procedural rights in a criminal case).

benefits of these relationships.<sup>143</sup> Social capital has been defined as “the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance or recognition.”<sup>144</sup> Social capital can accrue inside or outside of government. Indeed, governmental institutions can create social capital and trust,<sup>145</sup> and without strong state institutions, Hobbesian social chaos may prevail.<sup>146</sup> As it relates to criminal justice citizenship, social capital can accrue through participation in many different activities, from community boards to juries to political organizing to protesting.<sup>147</sup>

Professor Robert Putnam, a pioneer in this field, includes in his definition of social capital both “social networks and the associated norms of reciprocity and trustworthiness.”<sup>148</sup> These networks, as described famously in Putnam’s *Bowling Alone*, “increase the productivity of individuals and groups in the community.”<sup>149</sup> Social capital helps communities because it creates social understanding and encourages local, mutually advantageous solutions.<sup>150</sup> It also increases people’s empathy for one another.<sup>151</sup> “[S]ocial capital makes us smarter,

143. Edward Fieldhouse & David Cutts, *Does Diversity Damage Social Capital? A Comparative Study of Neighbourhood Diversity and Social Capital in the US and Britain*, 43 CANADIAN J. POL. SCI. 289, 290 (2010).

144. *Id.* (quoting Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 248 (John G. Richardson ed., 1986)).

145. Margaret Levi, *Social and Unsocial Capital: A Review Essay of Robert Putnam’s Making Democracy Work*, 24 POL. & SOC’Y 45, 50 (1996).

146. *Id.* at 50 (discussing Yugoslavia and Lebanon as famous examples); *see also* Jean L. Cohen, *American Civil Society Talk*, in CIVIL SOCIETY, DEMOCRACY, AND CIVIC RENEWAL 55, 60–61 (Robert K. Fullinwider ed., 1999) (analyzing Robert Putnam’s theory of social capital); Peter Levine, *Bowling Alone After (Almost) 20 Years*, PETER LEVINE: BLOG FOR CIVIC RENEWAL (Feb. 18, 2014) <https://peterlevine.ws/?p=13329> [<https://perma.cc/2NGM-KEG7>] (mentioning both Putnam’s and Cohen’s arguments). The Seventeenth Century English philosopher Thomas Hobbs argued in *LEVIATHAN* that mankind had been in a state of nature, which was a war of “all against all,” and that absolute sovereign was necessary to provide protection to the people. Sharon A. Lloyd and Susanne Sreedhar, *Hobbes’s Moral and Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2019 ed.), <https://plato.stanford.edu/archives/spr2019/entries/hobbes-moral/> [<https://perma.cc/VNL2-RCGP>] (last updated Apr. 18, 2018).

147. *See, e.g.*, Stephen Abbott, *Social Capital and Health: The Role of Participation*, 8 SOC. THEORY & HEALTH 51, 58 (2010) (identifying and distinguishing several forms of participation).

148. Robert D. Putnam, E Pluribus Unum: *Diversity and Community in the Twenty-first Century*, 30 SCANDINAVIAN POL. STUD. 137, 137 (2007).

149. FERGUSON, *supra* note 8, at 74 (citing ROBERT D. PUTNAM, *BOWLING ALONE* 19 (2000)).

150. *Id.* at 74–75 (citing PUTNAM, *supra* note 148, at 288).

151. *Id.* at 75 (citing PUTNAM, *supra* note 148, at 288–89).

healthier, safer, richer, and better able to govern a just and stable democracy.”<sup>152</sup>

There is evidence that social capital in America, by some measures, is declining. One report by the Senate Joint Economic Committee found that, as compared with the past, there is less voting amongst people of voting age; people spend less time with their neighbors in their community; union membership and involvement are declining; church affiliation and attendance are declining; and wealthy and poorer communities are economically segregating, which in turn hinders community organizing in poorer communities.<sup>153</sup> Other research shows that America is in the midst of a “Loneliness Epidemic.”<sup>154</sup>

It is true that increasing social capital is not inherently good. Stronger social connections among particular subgroups do not always serve society’s best interests.<sup>155</sup> For example, Timothy McVeigh and other co-conspirators in the Oklahoma City bombing were members of a bowling league; this is a case where it may have been better to bowl alone.<sup>156</sup> The same can be said for communities of extremists like 8chan that network and support each other online.<sup>157</sup>

Furthermore, the benefits of social capital are not evenly distributed. They tend to skew away from society’s least privileged groups.<sup>158</sup> The theory of social capital has often failed to sufficiently consider the experience of marginalized communities,<sup>159</sup> and “the historical reality of

152. *Id.* (quoting PUTNAM, *supra* note 148, at 290).

153. VICE CHAIRMAN’S STAFF JOINT ECON. COMM., WHAT WE DO TOGETHER 3–4, 34, 49 (2017), [https://www.lee.senate.gov/public/\\_cache/files/b5f224ce-98f7-40f6-a814-8602696714d8/what-we-do-together.pdf](https://www.lee.senate.gov/public/_cache/files/b5f224ce-98f7-40f6-a814-8602696714d8/what-we-do-together.pdf) [<https://perma.cc/ZRR6-Y5WW>].

154. *The “Loneliness Epidemic,”* HEALTH RESOURCES & SERVS. ADMIN., <https://www.hrsa.gov/enews/past-issues/2019/january-17/loneliness-epidemic> [<https://perma.cc/Q3KD-ZELU>]. “Two in five Americans report that they sometimes or always feel their social relationships are not meaningful, and one in five say they feel lonely or socially isolated. The lack of connection can have life threatening consequences . . . .” *Id.* (quoting Professor Julianne Holt-Lunstad); see also Nicholas Kristof, *Let’s Wage a War on Loneliness*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/opinion/sunday/britain-loneliness-epidemic.html> [<https://perma.cc/8MTD-XJHF>] (comparing British and American responses to mass loneliness).

155. Elinor Ostrom, *Investing in Capital, Institutions, and Incentives*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT 153, 162 (Christopher Clague ed., 1997) (acknowledging that “[s]ocial capital can also have a dark side”).

156. Fareed Zakaria, *Bigger than the Family, Smaller than the State*, N.Y. TIMES, Aug. 13, 1995, § 7, at 1.

157. See Timothy McLaughlin, *The Weird, Dark History of 8chan*, WIRED (Aug. 6, 2019, 6:00 PM), <https://www.wired.com/story/the-weird-dark-history-8chan/> [<https://perma.cc/G9BL-2VSL>].

158. See Patrick T. Brown, *The Dark Side of Social Capital*, NAT’L AFF., Summer 2019, at 106, 106–07.

159. Irene Bloemraad, Book Review, 33 CANADIAN J. SOC. 439, 439 (2008) (reviewing BARBARA ARNEIL, *DIVERSE COMMUNITIES: THE PROBLEM WITH SOCIAL CAPITAL* (2006)).

exclusion, assimilation and eradication in the civic life of America.”<sup>160</sup> These communities may not be able to draw on the same “historical accumulation” of social capital as dominant groups.<sup>161</sup>

Notwithstanding these drawbacks to social capital, it seems reasonable that greater public participation in criminal justice could strengthen communal ties in positive and inclusive ways. Several avenues for reform involve citizens at many stages of the criminal process, like protest movements (e.g., Black Lives Matter), citizen advisory boards, and juries. These reforms could provide many citizens with opportunities to work together for the common good.<sup>162</sup> Participating in the criminal justice system should help citizens to become personally invested in local criminal justice issues, which could spur further reform. These same people who personally participate in criminal justice and are energized by the experience may choose to exercise their citizenship in other ways, such as by voting or becoming involved in other civic activities.<sup>163</sup>

There is evidence that participation in civic activity, broadly defined to “include voting, volunteering, participating in group activities, and community gardening,” produces better health outcomes and pro-social behavior.<sup>164</sup> For example, voting is associated with better self-reported health outcomes, and choosing not to vote is associated with poorer reported health.<sup>165</sup> Another major study of civic involvement concluded that adults who were civically involved had “greater self-esteem and better personal relationships,” “fewer illnesses, lower levels of depression,” and longer lives.<sup>166</sup> Civic engagement benefits the wider society, too. “States and countries with greater proportions of civically engaged citizens have lower rates of disease, mental illness, and suicide. They, too, have lower crime rates, as well as having greater economic prosperity, better-educated children, and more effective governments.”<sup>167</sup>

Additionally, a national study using longitudinal data of late teens and early adults found that those who had engaged in voting and volunteering

160. *Id.* at 441 (quoting ARNEIL, *supra* note 159, at 211).

161. *Id.* at 439.

162. Each reform has different costs and benefits and deserves separate consideration, but this Article focuses only on the jury.

163. See FERGUSON, *supra* note 8, at 75–76.

164. *Civic Participation*, HEALTHY PEOPLE 2020, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/civic-participation> [<https://perma.cc/TC88-284E>].

165. *Id.*

166. S. Mark Pancer & Sally Hussey, *The Psychology of Citizenship and Civic Engagement*, BANG THE TABLE BLOG (May 13, 2016), <https://www.bangthetable.com/blog/psychology-of-citizenship-and-civic-engagement/> [<https://perma.cc/DJ6Z-WGAL>] (summarizing Pancer’s own book, *The Psychology of Citizenship and Civic Engagement*).

167. *Id.*

had higher levels of income and educational attainment down the line, as well as better mental health and general health outcomes.<sup>168</sup> Another study “found that eighth-graders who had been involved in community service” (voluntarily or not) were almost twice as likely to graduate from college than their peers who had not.<sup>169</sup> Another study focusing on urban racial minorities also “found that civic engagement in adolescence is related to higher life satisfaction, civic participation, and educational attainment, and is related to lower rates of arrest in emerging adulthood.”<sup>170</sup>

Of course, as criminal justice citizenship’s benefits enhance social capital and benefit individuals, care must be taken to ensure that those benefits are widely dispersed in society to benefit everyone. This is an important point relating to juries because juries’ racial compositions often skew toward Whites. If reforms to the jury system fail to address that skew, the social capital created by juries might reinforce inequality.

## ii. Shared Legal and Ethical Standards

Relatedly, community participation in criminal justice could strengthen commitment to shared ethical standards.<sup>171</sup> These values can be substantive or procedural.<sup>172</sup> Substantive values include what behavior should be criminalized and how the system should sentence wrongdoers.<sup>173</sup> The criminal sentence “is to the moral sentiment of the public . . . what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment.”<sup>174</sup>

Procedural values are sometimes boiled down to fairness, efficiency, and accuracy in sorting the guilty from the innocent, but there are many more. Values are inherent to any procedure. For example, any procedure must treat defendants as fellow citizens who are deserving of due process and equal protection. “[M]oral questions lie at the root of criminal

168. Parissa J. Ballard et al., *Impacts of Adolescent and Young Adult Civic Engagement on Health and Socioeconomic Status in Adulthood*, 90 CHILD DEV. 1138, 1148 (2019).

169. Melinda Wenner Moyer, *Kid Activists Aren’t Political Pawns*, SLATE (Apr. 1, 2019, 5:28 PM), <https://slate.com/human-interest/2019/04/youth-political-activism-climate-change-kids-gun-control-teens.html> [<https://perma.cc/NG4C-YJXG>].

170. Wing Yi Chan et al., *Adolescent Civic Engagement and Adult Outcomes: An Examination Among Urban Racial Minorities*, 43 J. YOUTH ADOLESCENCE 1829, 1829 (2014).

171. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 758–59 (2010).

172. See *id.* at 741.

173. See *id.* at 760.

174. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1392 (2003) (quoting 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81 (London, MacMillan & Co. 1883)).

procedure. In practice, people judge criminal justice not on technical issues, but on social and moral ones.”<sup>175</sup>

There is utility in distributing criminal liability and punishment according to people’s “shared intuitions of justice.”<sup>176</sup> The system’s ability to control behavior by stigmatization depends on whether people generally accept it as morally credible. In other words, if the criminal law’s commands are not popular, no stigma attaches to violating them, thus removing an important popular incentive to obey. Relatedly, the criminal law itself helps to shape and maintain shared moral principles; “[i]t can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality.”<sup>177</sup> And in close cases, where people are not sure of how to act, people may defer to the criminal law as an authoritative statement of what the community has deemed acceptable.<sup>178</sup> In summary, one important reason why people obey the law is because they fear the social consequences—not limited to criminal punishment—of violating shared norms.<sup>179</sup>

### iii. Firsthand Knowledge of Government

Another major benefit of citizens’ active participation in government is that they learn firsthand about how the system works. This was Alexis de Tocqueville’s observation about jury duty, but it should apply to other democratic criminal justice reforms as well. He wrote,

Local institutions are to liberty . . . what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions, a nation may give itself a free government, but it has not got the spirit of liberty.<sup>180</sup>

175. *Id.* at 1389.

176. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 18 (2007).

177. Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 154 (2008).

178. *See id.*

179. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997); *see also* Robinson & Darley, *supra* note 176, at 19 (stating that another reason why people obey the law is because they have internalized society’s moral standards and they want to “live up to” those moral standards).

180. Levin, *supra* note 65, at 30 (stating that Tocqueville believed that “civic life itself could advance this cause through both the private associations of civil society and the public institutions of an active democracy”).

Modern sociological research has confirmed Tocqueville's observations: jury service tends to increase citizens' understanding of, and confidence in, the legal system.<sup>181</sup>

### 3. Limits of Participation

Although beneficial, citizen participation is not without its limits. First, citizens have limited capacities and often lack relevant expertise.<sup>182</sup> For example, legal professionals necessarily dominate the courtroom presentation of evidence and arguments, and lay juries cannot interpret byzantine laws better than judges. Furthermore, for practical reasons, all large democracies are representative democracies, employing intermediaries to represent the people. Thus, the challenge is finding just the right amount of citizen participation to complement representative government and its attendant bureaucracy.<sup>183</sup> Citizenship-minded reform seeks to reap the benefits of participation by letting citizens do what they do well, while at the same time achieving substantive results that are consistent with the membership concerns outlined above.

Second, participation can never completely close the gap between professional insiders and lay outsiders.<sup>184</sup> Outsiders (i.e., voters and reform-minded politicians) might determine that insiders (i.e., the professionals, bureaucrats, and lawyers) are failing to represent the people's interests, but insiders, with their expert understanding of the inner workings of the system, are often able to stymie or defeat reforms imposed by outsiders.<sup>185</sup> This does not necessarily represent a failure of democracy, assuming that elected representatives and duly appointed bureaucrats are honorably fulfilling their functions within the system. But because bureaucrats are only indirectly accountable to the people, outsiders need several mechanisms to keep them in check, including

181. JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY* 9–11, 129–30, 152–53 (2010).

182. See BRUCE E. CAIN, *DEMOCRACY MORE OR LESS* 6–8 (2015).

183. See *id.* at 7.

184. Bibas, *supra* note 106, at 952.

“A note of pessimism is in order. We are not about to abandon the twenty-first-century world of guilty pleas and return to the eighteenth century anytime soon . . . . As long as professionals run criminal justice, there will be a significant gap of information, participation, and desires between insiders and outsiders. Politicians and the media will continue to exploit and exacerbate the gap, and sound-bite policymaking will continue to work. Nevertheless, reforms could at least improve the current dismal state of affairs, creating more community knowledge, involvement, and oversight.”

*Id.*

185. See *id.* at 941, 943 (discussing how the “Three-Strikes, You’re Out” Law in California attempted to curtail prosecutors’ charging discretion and how prosecutors found ways around it).

electoral accountability of those appointing the bureaucrats, sufficient transparency, and, at appropriate stages of the criminal process, direct participation.

Third, citizens can and do act in biased ways as they participate. The best example of the accumulated effects of this bias is the phenomenon of mass incarceration. The United States leads the world in incarceration rates, which are astronomical.<sup>186</sup> Nearly 2.3 million people are incarcerated in the United States.<sup>187</sup> Another 840,000 are on parole and 3.6 million people are on probation.<sup>188</sup> This mass incarceration inflicts especially severe harms on poor communities and communities of color.<sup>189</sup> For example, one in three Black males born today, and one in six Hispanic males born today, can expect to be incarcerated in their lifetimes, as compared with one in seventeen White males.<sup>190</sup> And even after convicts have served their time, they and their communities continue to suffer from the negative effects of incarceration.<sup>191</sup>

Because so much of mass incarceration can be attributed to democratic excesses, many scholars have proposed “penal elitism” as the remedy—that is, putting the criminal justice system in the hands of experts.<sup>192</sup> But this partially misdiagnoses the causes of mass incarceration. This crisis came to pass not only by lay participation, the choices of voters, elected officials, and juries. The professionals participated, too, and distorted the public will; bias can be demonstrated in the actions of police, prosecutors, bureaucrats, judges, and other professionals.<sup>193</sup> The extreme inequality present in the criminal justice system has arisen out of the innumerable choices by professionals and lay persons alike, in all stages of the system and over a long period of time.

186. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (discussing the massive growth in America’s prison population).

187. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/NK75-P4WG>].

188. *Id.*

189. ALEXANDER, *supra* note 54, at 97–139.

190. *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/K7KF-ZW79>].

191. For a discussion on the collateral effects of incarceration on the formerly incarcerated, including health problems, denial of civil rights such as the right to vote, and weakened and broken relationships of incarceration, see David S. Kirk & Sara Wakefield, *Collateral Consequences of Punishment: A Critical Review and Path Forward*, 1 ANN. REV. CRIMINOLOGY 171, 171, 175 (2018).

192. Albert W. Dzur et al., *Punishment and Democratic Theory: Resources for a Better Penal Politics*, in DEMOCRATIC THEORY AND MASS INCARCERATION, *supra* note 62, at 1, 4. See generally RACHEL ELISE BARKOW, *PRISONERS OF POLITICS* (2019) (discussing the public’s lack of reliance on experts when addressing how to reduce crime and other elements of penal elitism).

193. See, e.g., ALEXANDER, *supra* note 54, at 109, 118, 123.



Each proposed reform will have to consider how bias can be rooted out at every step in the process. At the same time, in America's democracy, the system can never stray too far from the people's control if it is to enjoy legitimacy; in other words, there can be a greater role for the experts in certain aspects of criminal justice, even as the people get their say in others.

A final limitation on citizens' participation is that most Americans do not want to participate in democracy.<sup>194</sup> They would rather not make political decisions or participate in deliberations, and they do not care about most policy issues. To put it bluntly, they would rather "spend their time in nonpolitical pursuits."<sup>195</sup> Only on the rare occasions when they do want to be involved do they want democratic processes to be visible, accountable, and representative.<sup>196</sup> This is partly a function of socioeconomic status: people who are less educated have a harder time getting informed, and people struggling to make ends meet have less time to participate in politics, community action, or jury service.<sup>197</sup>

### C. Deliberation

Like participation, deliberation is a key principle of democratic citizenship. Deliberation is the process by which people in specific forums (e.g., juries, city councils, the public square) engage in reasoned discussions to make, or help others make, better collective decisions. Many scholars have argued that society should incorporate more deliberative features into America's institutions, including courts, legislatures, and agencies.<sup>198</sup>

In democratic theory, deliberation often complements participation. For example, although it is possible to participate in politics sincerely but not rationally (e.g., a juror who refuses to listen to the other jurors in deliberations), it is more desirable that participation be rational. Likewise, deliberation is only one form of participation, but studying, thinking, talking, listening, and even voting are not enough on their own to power America's democracy; broader participation is required. Thus, these two strains of democratic theory are often paired.

Political scientists have identified the following key features of deliberative democracy:

- (1) Citizens regard each other as moral equals.

194. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY* 1 (2002) ("The last thing people want is to be more involved in political decision making . . .").

195. *Id.* at 2.

196. *Id.*

197. See PUTNAM, *supra* note 148, at 192–93.

198. Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 10 & nn.5–7 (2006) (collecting citations).

- (2) There is a public sphere to which all have free and equal access.
- (3) The people have strong free speech rights, and there are norms of respect, civility, and listening to buttress those rights.
- (4) The public focuses its deliberations on the most important issues.
- (5) The public is sufficiently informed about these issues via transparency in government and a free press.
- (6) The deliberations are based on reason, as opposed to pure emotion or threats, and participants are at least in principle willing to change their minds.
- (7) The deliberations result in a decision based on public consensus.
- (8) The relevant governmental decision makers are meaningfully responsive to that decision.
- (9) Deliberation can lead to greater social welfare.

Each of these ideals is discussed below. “Because previous sociological research suggests that these requirements are rarely met, deliberative theory tends to be normative in tone.”<sup>199</sup> That point could be made much more strongly in the current highly polarized political climate. But the fact that perfect deliberations rarely exist is no reason to reject these ideals. Public deliberations are built into America’s constitutional order and must be employed, if only at some minimal threshold of quality, for that order to succeed.<sup>200</sup> Furthermore, even less-than-perfect deliberations can improve social welfare, as discussed below in Section II.C.9.

Citizen deliberations play a key role in the criminal justice system. That system has many specialized functions, some of which require sensitive, individualized moral judgments. Defining crimes, for example, is an expression of society’s most fundamental ideals, and punishment must reflect, in some way, the community’s rejection of criminal behavior and its conception of how to deal with it. The same goes for whether and how justice might be served in particular cases by convicting the accused and imposing punishment, in light of all the surrounding circumstances. The deliberation and participation of citizens in these decisions are both vital. Citizens can bring common sense value

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199. Rubin, *supra* note 110, at 747.

200. See *infra* Section II.C.9.

judgments to the process where difficult questions of justice, mercy, and retribution require a sensitive balancing of values that may elude bureaucrats.<sup>201</sup> Overall, citizen deliberation can improve outcomes, shore up legitimacy, and strengthen solidarity and commitment to attempt to re-stitch the social fabric.<sup>202</sup>

Criminal justice professionals are also necessary. Their expertise can provide stability, dispassion, bureaucratic regularity, predictability, efficiency, and technical and scientific rigor. But if this rationalizing and bureaucratizing the criminal justice process is taken to excess, the process may cease to reflect the ethical life of the people it is meant to serve, imposing instead a set of values inimical to the people's. The resulting system may ultimately fail to repair broken relationships.

Below, this Article considers nine important features of democratic deliberations and their application to the criminal justice system.

### 1. Shared Recognition of Other Citizens as Moral Equals

Participants of deliberations must regard each other as equals.<sup>203</sup> This quality of citizenship is captured by Cass Sunstein's notion of political "grace."<sup>204</sup> For Sunstein, grace is a character trait of democratic citizens that "embodies a commitment to empathy" for others' views and experiences.<sup>205</sup> It assumes that one's political opponents act in good faith; it refuses to engage in "political savagery."<sup>206</sup> This trait in the citizenry makes possible both "political learning" and compromise.<sup>207</sup> In other words, deliberations founded upon public graciousness can result not only in greater consensus—no small feat in a society with competing interest groups—but also greater wisdom than each group initially brought to the debate.<sup>208</sup> Furthermore, "[w]hen people see each other as fellow citizens rather than as enemies, they are more likely to attend not only to different judgments about facts, but also to different moral commitments. Manichaeism becomes difficult or even impossible."<sup>209</sup> In

201. Note that bureaucrats may have a better understanding of more scientific questions, such as how to deter crime and reintegrate offenders into society.

202. See Kleinfeld, *supra* note 31, at 1400.

203. McCubbins & Rodriguez, *supra* note 198, at 15 (citing Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE* 95, 100 (Seyla Benhabib ed., 1996)).

204. Cass Sunstein, *Political Savagery Makes Self-government Impossible*, *ECONOMIST* (Mar. 8, 2019), <https://www.economist.com/open-future/2019/03/08/political-savagery-makes-self-government-impossible> [<https://perma.cc/6ENJ-YZ6E>].

205. *Id.*

206. *Id.*

207. *Id.*

208. See *id.*

209. *Id.*

other words, graceful citizens, by empathizing with their opponent's views, cannot help but have more nuanced views themselves.

Deliberation among citizens by its nature should limit the scope of criminal law. "Criminalization requires a more piecemeal process of public deliberation: what will limit the law's scope is not some master principle(s), but the spirit in which such deliberation is conducted—as deliberation about what we can properly demand of each other as citizens on pain of formal condemnation and punishment."<sup>210</sup> In the same way, citizens who view each other as moral equals see more purposes to criminal justice than pure retribution. They also seek to understand why a defendant acted the way that he did; they seek to reintegrate that person into the community. They reject the brand of racism that, although lacking overt insults or epithets, demonstrates little concern for the plight of communities of color and turns a blind eye to the mass incarceration of citizens of color and the negative effects this has on their families and communities.<sup>211</sup>

## 2. Public Sphere to Which All Have Free and Equal Access

Healthy democratic deliberations require a public sphere in which members of the political community can communicate about public life on free and equal terms, having access to the relevant means of communication.<sup>212</sup> If the voices of more advantaged participants to the process are disproportionately amplified, outcomes will be distorted and the other views of the group may remain unexplored. These distorted outcomes could "reproduce the inequalities and power relations among the participants."<sup>213</sup> This "deeply undermine[s]" the democratic ideal of popular self-rule.<sup>214</sup> In criminal justice, a few examples of access to public spheres include equal and effective opportunities to voice opinions in the public square, equal representation on juries, and local influence over policing policy and priorities.

## 3. Freedom of Speech and Norms of Respect, Civility, and Listening

A deliberative democracy ideally protects broad speech rights,<sup>215</sup> as well as cultural and political norms of respect, civility, and listening to support those rights. English philosopher John Stuart Mill described these norms, which he called the "morality of public discussion," in his famous

210. Duff, *supra* note 91, at 303.

211. See ALEXANDER, *supra* note 54, at 103, 113.

212. See Kleinfeld, *supra* note 31, at 1385.

213. James S. Fishkin & Jane Mansbridge, *Introduction*, DAEDALUS, Summer 2017, at 6, 9.

214. *Id.* at 7.

215. Cohen, *supra* note 146, at 57–58, 70.

tract “On Liberty.”<sup>216</sup> Mill argued that civil discourse should be “temperate” (as by avoiding “invective” and “sarcasm”) and “not pass the bounds of fair discussion.”<sup>217</sup> None should “argue sophistically, . . . suppress facts or arguments, . . . misstate the elements of the case, or misrepresent the opposite opinion.”<sup>218</sup> Polemicists should never “stigmatize those who hold the contrary opinion as bad and immoral men.”<sup>219</sup> Those who hold the prevailing view need to observe the rules of civil discourse more scrupulously because the tendency in public discourse is for the majority to use shaming and other unfair tactics to silence the minority.<sup>220</sup> To effectively deliberate, society should give “merited honour to every one, whatever opinion he may hold, who has calmness to see and honesty to state what his opponents and their opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favor.”<sup>221</sup> Mill recognized that this ideal was often violated but noted optimistically “that there are many controversialists who to a great extent observe it, and a still greater number who conscientiously strive towards it.”<sup>222</sup>

In criminal justice, examples of this include standard rules of engagement in town hall forums, jury instructions about how to deliberate, and rules of courtroom decorum.<sup>223</sup>

#### 4. A Debate of Only the Most Important Public Issues

Next, citizens must debate at least the most important issues in the public sphere.<sup>224</sup> In ancient Athens, perhaps all the citizens could debate all matters of public importance. But that would be impossible in a large, modern society. Today, a whole citizenry cannot deliberate with each other on any issue, let alone all of them. In a representative democracy, moreover, society generally elects politicians to engage in such legislative deliberations on behalf of the people, or society willingly

216. JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND UTILITARIANISM 3, 70 (Bantam Dell 2008) (1859).

217. *Id.* at 68–69.

218. *Id.* at 68.

219. *Id.* at 69.

220. *See id.*

221. *Id.* at 70.

222. *Id.*

223. *See, e.g., Courtroom Etiquette*, ILL. CTS., <http://www.illinoiscourts.gov/SupremeCourt/Etiquette.asp> [<https://perma.cc/HKW5-Z85Z>]; Mark Preston, *CNN Announces Rules for Next Democratic Presidential Debates*, CNN (July 9, 2019, 4:26 PM), <https://www.cnn.com/2019/07/09/politics/cnn-debate-rules/index.html> [<https://perma.cc/QYV7-JGGT>] (listing rules for democratic primary debates, including that “[a] candidate who consistently interrupts will have his or her time reduced”).

224. Kleinfeld, *supra* note 31, at 1385.

assents to experts in the criminal justice system (e.g., professionalized police forces, probation and parole officers) making difficult decisions for the people. Furthermore, leaving aside questions of system design, deliberations take a toll on each participant. Most people are either unwilling or unable to put in the time and effort to become familiar with the issues they care about, let alone the issues they care less about. And few are inclined to listen to and try to understand the views of those whose opinions differ.<sup>225</sup>

Still, citizens can and should deliberate about certain criminal justice issues. Trial juries do this in specific cases, but other examples come to mind, such as public hearings on particular police practices or ballot initiatives like Three Strikes—and its repeal—in California.

### 5. A Populace Informed About the Relevant Issues

To deliberate well, the populace must be sufficiently informed on the issues.<sup>226</sup> To become informed, the government must be transparent, the news media must be robust, and the people must be both interested in the issues and able to become informed.

Transparency is especially important. Members of the public cannot personally participate in criminal justice processes, so the public, researchers, and the media must be able to monitor these processes. This includes open meetings, public jury trials, the gathering and publication of statistics relating to the criminal justice system,<sup>227</sup> and judicial reluctance to seal court files and proceedings. Interest groups and concerned citizens also help to publicize the system's workings.<sup>228</sup> Transparency enables deliberation and democratic action.

### 6. Reasoned Discussion, Not Based on Emotion or Threats

Citizens in their deliberations should attempt to persuade each other through reason, as opposed to pure emotion or threats.<sup>229</sup> This is not a controversial idea, but it reveals a clear shortcoming of deliberative democracy because, in real life, people do not deliberate based on reason

225. See McCubbins & Rodriguez, *supra* note 198, at 11–12.

226. Dalton calls this broad principle of citizenship “autonomy,” which requires citizens to be sufficiently informed about the issues, to participate in democratic deliberations, and ideally to understand others’ views. See Dalton, *supra* note 60, at 78–79.

227. See, e.g., Jason Tashea, *Liberating Criminal Justice Data: How a Florida Law Provides a Blueprint for the Nation*, A.B.A. J. (June 18, 2019, 6:30 AM), <http://www.abajournal.com/web/article/liberating-criminal-justice-data-how-a-florida-law-offers-a-blueprint-for-the-nation> [https://perma.cc/Q35N-T2TC] (describing efforts of Measures for Justice, a non-profit organization, to collect and publicize data relating to criminal justice).

228. See Simonson, *supra* note 2, at 2184–90.

229. See Cohen, *supra* note 146, at 58, 70.

alone. Moreover, what is “reasonable” is itself debatable. Reason is often employed post hoc to justify conclusions to which people are already inclined based on personal experiences, tribal identities, and emotions.<sup>230</sup> In politics, for example, individuals might have such vested interests in the outcome of a debate that it is unlikely others’ reasoning will dissuade them.<sup>231</sup>

For quality deliberations to occur, citizens must at least be open to changing their minds.<sup>232</sup> Philosopher John Stuart Mill provided a good description of this:

[T]he only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this . . . .<sup>233</sup>

Of course, in practice, members of society are not usually very open to changing their minds.<sup>234</sup> But in a well-functioning democracy, those in the minority will be prepared to accept the decision of the group even if they do not agree with it.<sup>235</sup> If they feel that their views have been listened to and considered, they will more likely view group decisions as legitimate.<sup>236</sup> This legitimacy is possible even where only a small subset of the population was involved in making the decisions.<sup>237</sup>

## 7. The Deliberations Result in a Decision Based on Public Consensus

The most basic purpose of public deliberations is to arrive at a decision or consensus by changing the preferences upon which people decide to act.<sup>238</sup> In other words, the conclusion of the debate should at least “represent a mutually agreed-upon position” of the most people

230. See THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961) (“As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.”).

231. See Rubin, *supra* note 110, at 750–51.

232. Kleinfeld, *supra* note 31, at 1385.

233. MILL, *supra* note 216, at 27, 67 (noting that truth can be supplied by “the collision of adverse opinions”).

234. McCubbins & Rodriguez, *supra* note 198, at 12.

235. See *id.* at 15.

236. Meares & Tyler, *supra* note 89, at 526–27.

237. See McCubbins & Rodriguez, *supra* note 198, at 15.

238. *Id.* at 14.

possible.<sup>239</sup> This ideal can be traced back to ancient Athens, where citizens engaged in extended public debate to achieve not just consensus but unanimity, called *homonoia*.<sup>240</sup> Aristotle thought, probably correctly, that *homonoia* was only possible in a small, tightly-knit, homogeneous society like Athens.<sup>241</sup> Of course, this unanimity was an illusion because the voices of most Greeks, such as women and slaves, were excluded from the formation of *homonoia*.<sup>242</sup> In today's large, diverse society, achieving unanimity is impossible, but some degree of consensus and mutual understanding must and can often be achieved.

True, social consensus has its downsides. Too much consensus can actually hamper future deliberations because citizens who all agree have no need to consider new arguments and approaches.<sup>243</sup> Over time, people may become stuck in old ways of thinking and unable to solve new challenges.<sup>244</sup> Furthermore, people may prefer to conform to the consensus for conformity's sake rather than risk social disapproval by supporting novel and better ideas.<sup>245</sup>

There have long been a few points of consensus in the United States about criminal procedure, at least in the broad brush strokes. These points include the presumption of innocence, due process of law, and the right to a jury trial. Regarding punishment, society has been somewhat schizophrenic, agreeing about both retribution (especially for those in out-groups) and rehabilitation (especially for members of in-groups).<sup>246</sup>

## 8. Government Should be Meaningfully Responsive to the Deliberations

Deliberations should determine “the basic thrust of public policy”;<sup>247</sup> that is, the government should heed the results of public deliberation (insofar as such results can be ascertained).<sup>248</sup> If the state does not respond to the people's deliberations, the deliberations can sometimes seem like a mere ploy to provide an illusion of power and influence.<sup>249</sup>

239. Rubin, *supra* note 110, at 747.

240. BELLAMY, *supra* note 61, at 34.

241. *Id.* at 33–34.

242. *See id.* at 34.

243. Henrik Friberg-Fernros & Johan Karlsson Schaffer, *The Consensus Paradox: Does Deliberative Agreement Impede Rational Discourse?*, 62 POL. STUD. 99, 99 (2014).

244. *Id.* at 104.

245. *Id.* at 104–05.

246. *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321 & n.21 (2005).

247. Rubin, *supra* note 110, at 747.

248. Kleinfeld, *supra* note 31, at 1385.

249. For example, in the wake of the Gilets Jaunes protests, the French government held three months of public debate that distracted protesters and apparently drained the movement of



Deliberative processes should specify how exactly the decisions arrived at will be implemented.<sup>250</sup> Also, there has to be an agreed-upon framework for how to apply a general rule—arrived at by proper deliberations—to a particular case.<sup>251</sup> Designing the correct institution is essential to the deliberative model.<sup>252</sup>

Part of deliberation's appeal as being fundamental to democracy is that it allows the people to self-legislate. One can imagine a representative democracy where elected officials simply deliberate among themselves and pass laws with little or no public deliberation. But public deliberation enables a more direct form of self-rule; it allows the people to be the author of their own laws in addition to electing leaders to enact them.<sup>253</sup>

The Constitution recognizes the potential power of deliberations and enshrines them in and between the branches of government. For example, both chambers of Congress deliberate internally on the passage of laws.<sup>254</sup> The deliberations of members of Congress are protected by the Speech and Debate Clause.<sup>255</sup> There is a back-and-forth between the Congress and the President requiring "[r]econsideration" when they cannot agree over the passage of a law;<sup>256</sup> there are special deliberative procedures for ratifying treaties (e.g., Advice and Consent of the Senate) and making executive appointments.<sup>257</sup> By "giv[ing] . . . Information of the State of the Union" and making recommendations, the President engages in deliberations with Congress.<sup>258</sup> Special deliberations are baked into the Judicial Branch as well, which has its own jury trial guarantee.<sup>259</sup> Juries are small groups of citizens from outside the government whose deliberations bind the government.

Outside of the tripartite branches, the Constitution protects and fosters deliberation among citizens and between citizens and their government. The First Amendment protects freedom of speech and of the press and

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energy and momentum. Adam Nossiter, *'Debate' in France Is Over, With Much Left to Discuss*, N.Y. TIMES, Apr. 9, 2019, § A, at 8.

250. McCubbins & Rodriguez, *supra* note 198, at 15.

251. *Id.* at 16.

252. *Id.*

253. Kleinfeld, *supra* note 31, at 1385.

254. See U.S. CONST. art. I, §§ 5, 7.

255. *Id.* § 6 ("[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place.").

256. *Id.* § 7.

257. *Id.* art. II, § 2.

258. *Id.* § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . .").

259. *Id.* art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .").

“the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>260</sup> And Article IV guarantees a “Republican Form of Government” to each state,<sup>261</sup> which guarantees, *inter alia*, rule by the people.<sup>262</sup>

In summary, one reason that Americans expect to have the opportunity to participate in public deliberations of important issues, including criminal justice issues, derives from the Constitution’s numerous and popular deliberative features. This, in turn, helps to explain the prominence of criminal justice issues in politics.

### 9. Deliberation Can Lead to Greater Social Welfare

There are two strands of theory supporting deliberative democracy.<sup>263</sup> One strand is essentially normative and claims that deliberations are necessary to any desirable version of democracy.<sup>264</sup> Much of the foregoing discussion has focused on these normative arguments.

The other strand claims that deliberation actually improves social welfare.<sup>265</sup> This notion was described well by Mill, who argued that “on any matter not self-evident, there are ninety-nine persons totally incapable of judging of it, for one who is capable.”<sup>266</sup> Nevertheless, Mill observed “a preponderance among mankind of rational opinions and rational conduct.”<sup>267</sup> This seeming paradox could be explained, at least in part, by the power of deliberation: “[M]an either as an intellectual or as a moral being . . . is capable of rectifying his mistakes, by discussion and experience. . . . Wrong opinions and practices gradually yield to fact and argument . . . .”<sup>268</sup>

More recently, the promises of deliberative democracy have been summarized as follows: to “revive democratic legitimacy, provide for

260. *Id.* amend. I.

261. *Id.* art. IV, § 4.

262. See Robert G. Natelson, *Guarantee Clause*, HERITAGE FOUND., [www.heritage.org/constitution?essay\\_id=10000127](http://www.heritage.org/constitution?essay_id=10000127) [https://perma.cc/7RQU-T7HQ] (scroll to “Essays on Article IV”; click “Guarantee Clause”) (stating that the Guarantee Clause also ensures the rule of law and absence of monarchy); see also Robert G. Natelson, *A Republic Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 812 (2002) (discussing cases that mention that republic government is representative government). The electoral college and indirect election of senators are other examples of filtering the people’s votes through more elite guardians of the public will. See U.S. CONST. art. I, § 3; *id.* art. II, § 1.

263. McCubbins & Rodriguez, *supra* note 198, at 13.

264. *Id.*

265. *Id.* at 14.

266. MILL, *supra* note 216, at 26.

267. *Id.*

268. *Id.* at 26–27.

more authentic public will formation, provide a middle ground between widely mistrusted elites and the angry voices of populism, and help fulfill some of our common normative expectations about democracy.”<sup>269</sup> There is empirical evidence for these claims. Summarizing the evidence in the field, a group of scholars has argued that deliberation is essential to any well-functioning democracy.<sup>270</sup> Deliberative theory has begun to consider the varying speech cultures of socially disadvantaged groups, and deliberative practice has ways of amplifying the voices of these groups.<sup>271</sup> Furthermore, *contra* claims that deliberation tends to result in more extreme views, deliberation can actually moderate views when the deliberative body is heterogeneous.<sup>272</sup> In fact, “deliberative practices can flourish in deeply divided societies.”<sup>273</sup>

It is true that the design of a particular deliberative mechanism or institution is critical, and there is no space here to discuss them in detail. But some innovations are particularly promising. One popular experiment involves statistically representative “mini-publics” (of perhaps a few hundred) or “citizens’ juries” (of perhaps a few dozen) that are tasked with deliberating a public issue in an organized setting.<sup>274</sup> They arrive at a nonbinding (or perhaps even a binding) recommendation for the decision maker.<sup>275</sup> This recommendation does not merely express the preexisting opinions of the majority of the mini-public but is arrived at through a long, structured, and facilitated process, ensuring that the recommendation truly results from the mini-public’s deliberations.<sup>276</sup>

Of course, there is a robust scholarly debate surrounding these claims.<sup>277</sup> Some experts, for example, have concluded that “[w]hatever the relationship between idealized theories of deliberation and social welfare, deliberation in practice is unlikely to improve social welfare because it is improbable that groups of people will be willing to speak,

269. Fishkin & Mansbridge, *supra* note 213, at 7.

270. Nicole Curato et al., *Twelve Key Findings in Deliberative Democracy Research*, DÆDALUS, Summer 2017, at 28, 29.

271. *See id.* at 30–31.

272. *Id.* at 33. Another deliberative condition that resists polarization is the presence of a facilitator. *Id.* Polarization following deliberation is not necessarily a bad thing, such as when the process allows oppressed minorities the opportunity to more clearly form their views and share them with other like-minded members of the deliberative body. *See id.*

273. *Id.*

274. Fishkin & Mansbridge, *supra* note 213, at 8–9.

275. *Id.*

276. For an example of how this might have worked in the context of Brexit, see Claus Offe, *Referendum vs. Institutionalized Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision*, DÆDALUS, Summer 2017, at 14, 23–25.

277. *See, e.g.,* Ian Shapiro, *Collusion in Restraint of Democracy: Against Political Deliberation*, DÆDALUS, Summer 2017, at 77, 78–79.

listen, and learn from one another.”<sup>278</sup> Furthermore, the current age may represent a nadir in deliberations in the public square. A Pew survey recently found that “58% of adults are not confident that others can hold civil conversations with people who have different views.”<sup>279</sup>

Notwithstanding all this, the claim of some that deliberative democracy is unrealistic is simply not true.<sup>280</sup> The deliberative ideal is worth striving for, both because it is necessary to any desirable version of democracy and because, under at least some conditions, it works. In criminal adjudication, for example, the United States has a long history of using juries to decide criminal cases. In Part III, this Article turns to how well this institution comports with the ideals of criminal justice citizenship, including deliberation, and how it might be reformed.

### III. CRIMINAL JUSTICE CITIZENSHIP IN THE COURTS

Applying the theory of criminal justice citizenship to jury trials yields powerful theoretical and policy insights. Jury trials should strengthen the key social conditions of citizenship discussed in Part II: membership, participation, and deliberation. This insight points to the benefits of more and better jury trials. However, these benefits are offset by the costs of jury trials, which must be carefully weighed in the balance.

#### A. Membership

As explained above, citizenship *qua* membership encompasses four interrelated principles: equality, belonging, solidarity, and legitimacy.<sup>281</sup> A jury trial system that supports criminal justice citizenship must respect each one of these.

First, citizens should have equal rights to serve on juries, and all jurors should have an equal voice.<sup>282</sup> Constitutional law recognizes the importance of equality in jury composition. Although Blacks had long been excluded from American juries,<sup>283</sup> in the 1986 case *Batson v. Kentucky*,<sup>284</sup> the U.S. Supreme Court held that the Equal Protection

278. McCubbins & Rodriguez, *supra* note 198, at 12.

279. Lee Rainie et al., *Trust and Distrust in America*, PEW RES. CTR. (July 22, 2019), [https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/?fbclid=IwAR2tC\\_ehX7RKhhI22llsLL0-1QiCCwOIBt1glzPAhNQDRGhuGoAhkx945Dk](https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/?fbclid=IwAR2tC_ehX7RKhhI22llsLL0-1QiCCwOIBt1glzPAhNQDRGhuGoAhkx945Dk) [<https://perma.cc/7WR4-D6L8>].

280. See Curato et al., *supra* note 270, at 29 (summarizing ways in which diverse deliberative innovations have been implemented to effectively influence policies).

281. See *supra* Section II.A.

282. See Duff, *supra* note 99, at 302 (arguing that a jury trial should be a way for citizens to hold a fellow citizen accountable for a proved breach of the law).

283. See, e.g., Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1595 (2018).

284. 476 U.S. 79 (1986).

Clause forbids members of the jury venire from being excluded on account of their race.<sup>285</sup> (However, the Court did not hold that defendants had a right to have members of their own race on the petit jury.<sup>286</sup>) The Court made clear that this right belonged not only to defendants but also to prospective jurors, who had an interest as citizens in participating in criminal adjudication.<sup>287</sup> Excluding venire members on account of race diminished the democratic legitimacy of the jury trial.<sup>288</sup>

Unfortunately, *Batson* has had limited success in practice. For example, on federal juries, Blacks and Hispanics are persistently and substantially underrepresented.<sup>289</sup> The Equal Justice Initiative has documented widespread racial discrimination in jury selection in eight states, including counties in which prosecutors have excluded about 80% of qualified Blacks from jury service.<sup>290</sup> A jury lacks democratic legitimacy if it does not meaningfully represent a cross-section of the community.<sup>291</sup> Much could be done to address this problem.<sup>292</sup> For example, state governments could expand their jury lists to take underrepresented groups into account, and prosecutors who intentionally exclude jurors based on race could be disciplined.<sup>293</sup>

Likewise, where jury deliberations are infected by racism, equal citizenship is undermined, and with it the public's confidence in the criminal justice system. Historically, many jury decisions have been tainted by racism.<sup>294</sup> Although some progress has been made, racism

285. *Id.* at 85–88.

286. *Id.* at 85.

287. *Id.* at 87. In *Apprendi*, the Court extolled the jury in its communitarian role as “twelve of [the defendant’s] equals and neighbors” and as “the great bulwark of [our] civil and political liberties.” Appleman, *supra* note 171, at 735–36 (alterations in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)). Justice Antonin Scalia’s concurrence likewise stressed the idea that the Founders left criminal justice to juries, not the state. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

288. See Appleman, *supra* note 171, at 732.

289. See Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore?*, 52 U. MICH. J.L. REFORM 1, 11–12 (2018) (examining treatment of four challenges to jury pools in four federal districts).

290. EQUAL JUSTICE INITIATIVE, *supra* note 94, at 4–5.

291. See Toby S. Goldbach & Valerie P. Hans, *Juries, Lay Judges and Trials*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2716, 2719 (Gerben Bruinsma & David Weisburd eds., 2014).

292. Paradoxically, prosecutors often feel that they must consider race very carefully during jury selection to avoid *Batson* challenges. See Anna Offit, *Race Conscious Jury Selection*, 82 OHIO ST. L.J. 1, 44–68 (forthcoming 2021).

293. EQUAL JUSTICE INITIATIVE, *supra* note 94, at 46, 48.

294. See, e.g., ALEXANDER, *supra* note 54, at 119–21; Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1410 (1983).

persists in modern jury deliberations throughout the United States.<sup>295</sup> One cause of this is that unrepresentative juries deliberate less effectively than diverse juries. “Research suggests that, compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives.”<sup>296</sup> Furthermore, “[r]acial diversity significantly improves a jury’s ability to assess the reliability and credibility of witness testimony, evaluate the accuracy of cross-racial identifications, avoid presumptions of guilt, and fairly judge a criminally accused.”<sup>297</sup> The upshot has been that communities of color nationwide have, in many cases, lost confidence in mostly-white and all-white juries.<sup>298</sup>

Another good example of how the jury system defeats equal membership is the automatic exclusion of formerly convicted persons (for felonies and even misdemeanors) from the jury. Most states have statutory provisions to this effect, and many of those statutes pay no regard to the type or age of the conviction, the individual’s subsequent years of good behavior, or even the individual’s current attitude toward the criminal justice system.<sup>299</sup> Such exclusions heighten racial disparities in jury pools because people of color are often more likely to have a prior criminal conviction.<sup>300</sup> This, in turn, reduces the diversity of experience with the criminal justice system that is necessary for effective jury deliberations.<sup>301</sup> Finally, the exclusion denies an important civic opportunity and is therefore at odds with society’s goals of reintegrating formerly convicted persons.<sup>302</sup> While there may be good reasons in individual cases why such persons could not be fair and impartial jurors, the blanket exclusion of them from jury service unjustifiably restricts criminal justice citizenship. Even their exclusion through the use of peremptory strikes is questionable and should be carefully regulated because it may serve as a cover for racial or ethnic biases.<sup>303</sup> Additionally,

295. See, e.g., BRYAN STEVENSON, *JUST MERCY* 60–61 (documenting instances of discrimination by Southern all-white juries against Black defendants); Shamina Anwar et al., *Jury Discrimination in Criminal Trials* 2 (Queen Mary Univ. of London Sch. of Econ. & Fin., Working Paper No. 671, 2010) (examining data from Sarasota County, Florida, between 2004 and 2009, and finding “strong evidence that all-white juries acquit whites more often and are less favorable to black versus white defendants when compared to juries with at least one black member”).

296. EQUAL JUSTICE INITIATIVE, *supra* note 94, at 40.

297. *Id.* at 41.

298. *Id.* at 38.

299. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 596–97 (2013).

300. *Id.* at 602.

301. *Id.* at 605–06.

302. *Id.* at 610–13.

303. *Id.* at 638–39; see also Simonson, *supra* note 3, at 277–80 (arguing that the system tends to characterize prospective jurors as biased if they are defense oriented).

the system should take affirmative steps to make jury service more accessible to people of lower socioeconomic status, such as by providing job protection, decent stipends, and childcare.<sup>304</sup>

Second, where the right of jury service is not equally afforded, citizens may suffer from exclusion and a feeling of not belonging. In 2010, researchers from the Equal Justice Initiative study interviewed many Blacks who had been improperly excluded from jury service and found that the experience left many of them with “the sad recognition that their individual experiences were small pieces in the structure of racism that envelops their communities.”<sup>305</sup> “Many had overcome the legacy of the Jim Crow South to serve in the military, own businesses, and send their children to college, only to find discrimination still as close as their county courthouse.”<sup>306</sup> This feeling of exclusion marginalizes otherwise willing citizens from making a contribution to society.<sup>307</sup> The effects of this exclusion can ripple through their lives and reduce their likelihood of voting.<sup>308</sup>

Third, the jury system can strengthen social solidarity by solidifying a sense of the public good and strengthening people’s resolve to work toward that public good. A jury trial requires citizens to sit in judgment of each other. There is live witness testimony, courtroom intrigue, and all the spectacle that entails. The ensuing dramatic morality play reinforces the moral commands of the criminal law and strengthens the community’s resolve to abide by its commands.<sup>309</sup> Where the jury trial is perceived to be fair, many people feel that the jury speaks on behalf of the jurisdiction it represents. This is why the Supreme Court has recognized the jury as the “conscience of the community.”<sup>310</sup>

304. Roberts, *supra* note 299, at 639.

305. EQUAL JUSTICE INITIATIVE, *supra* note 94, at 29.

306. *Id.* at 28.

307. For example, Blacks and Hispanics are far less likely than Whites to believe that jury service is important to being a good citizen. John Gramlich, *Jury Duty Is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RES. CTR. (Aug. 24, 2017), <https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/> [<https://perma.cc/CHL5-WKYM>].

308. See BERNARD L. FRAGA, *THE TURNOUT GAP* 20–21 (2018).

309. See, e.g., BIBAS, *supra* note 4, at 5; LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 24–27 (1993) (noting that “criminal justice as social drama” was a common feature of colonial America). The common law has long recognized this. For example, the English Murder Act of 1752 required that, after the trial, the sentence must be pronounced immediately in the hearing of the public. APPLEMAN, *supra* note 8, at 17. This way, the jury and the entire criminal trial audience would have the benefit of witnessing the consequences of crime. *Id.*

310. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

Unfortunately, where the trial is perceived as unfair or the jury as biased, a jury verdict can divide the community.<sup>311</sup>

Jury service can strengthen social solidarity by enhancing people's commitment to the public good. Tocqueville made this argument long ago:

The jury teaches every man not to recoil before the responsibility of his own actions. . . . It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.<sup>312</sup>

For example, D. Graham Burnett served as the foreman of a New York City jury trial for murder.<sup>313</sup> After the murder trial for which he served as foreman concluded, he returned to his normal life and felt keenly a disorienting loss of greater purpose.<sup>314</sup> Burnett's service as a juror had changed him by allowing him to participate in an institution greater than himself, concerned only with the common good. Likewise, Professor Andrew Guthrie Ferguson has discussed his personal experience of acting as a defense attorney in a homicide trial.<sup>315</sup> The defense was self-defense.<sup>316</sup> The jury acquitted the defendant after some difficulty.<sup>317</sup> Afterward, the jury and lawyers gathered together, spontaneously holding hands in a circle, as a token of unity, in recognition of the difficulty (but essential fairness) of the trial process while at the same time acknowledging the loss to the community.<sup>318</sup> Unfortunately, as criminal jury trials have become rare, so too have such stories of solidarity.

Fourth, the jury system can strengthen the legitimacy of America's government. This has been its historical purpose: to put "real control of

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311. See, e.g., Anjuli Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Aug. 26, 2017, 1:21 PM), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [<https://perma.cc/S6QH-C2JS>] (discussing public reaction to the Rodney King verdict).

312. FERGUSON, *supra* note 8, at 78 (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284–85 (Phillips Bradley ed., Vintage Books 1990) (1835)).

313. *Id.* at 76 (citing D. GRAHAM BURNETT, *A TRIAL BY JURY* (2001)).

314. *Id.* at 76–77.

315. *Id.* at 77.

316. *Id.*

317. *Id.*

318. *Id.* at 77–78.



[legal] affairs into the hands of the ruled.”<sup>319</sup> Jury trials were intended to make criminal justice “fundamentally populist and majoritarian.”<sup>320</sup> Indeed, the jury was the Framers’ “dominant strategy to keep agents of the central government under control.”<sup>321</sup> The Sixth Amendment’s requirement that a jury be “of the State and district wherein the crime shall have been committed”<sup>322</sup> likewise ensured that verdicts reflected local values and understandings of the law. Because of this, juries tend to enjoy legitimacy; the Supreme Court recently recognized that the jury’s “judgments find acceptance in the community, an acceptance essential to respect for the rule of law.”<sup>323</sup> And a recent survey revealed that about two-thirds of U.S. adults think that serving on a jury “is part of what it means to be a good citizen.”<sup>324</sup>

In summary, jury service, when it is inclusive, has the potential of broadly distributing membership benefits throughout society. This Article now turns to how juries deliberate.

### B. *Deliberation*

Jury deliberations raise issues relating to several of the ideal features of citizen deliberation discussed above in Section II.C.

#### 1. Expanding the Public’s Right to Jury Trials

Because deliberations are costly, only the most important issues are suitable for public deliberations.<sup>325</sup> The boundaries of the jury trial right rest on similar considerations. Unfortunately, courts have sometimes too rigidly equated the importance of a case with the length of incarceration potentially at issue. This deprives the public of the opportunity of jury service in high-stakes cases.

For example, the Supreme Court has held that the constitutional jury trial right does not extend to all crimes, such as those with a maximum penalty of fewer than six months imprisonment or petty offenses.<sup>326</sup>

319. Bibas, *supra* note 106, at 950 n.179 (alteration in original) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270–76 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1988) (1835)).

320. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185 (1991).

321. *Id.* at 1183.

322. U.S. CONST. amend. VI.

323. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017).

324. Gramlich, *supra* note 307.

325. See *supra* Section II.C.4.

326. Baldwin v. New York, 399 U.S. 66, 68 (1970) (“[S]o-called ‘petty offenses’ may be tried without a jury.”); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937) (noting that the jury trial right “does not extend to every criminal proceeding”); see also Lewis v. United States, 518 U.S. 322, 326 (1996) (explaining that the Court presumes that a petty offense has a

Courts may also look to the “seriousness of other punishment” that the crime carries in determining whether there is a constitutional jury trial right.<sup>327</sup> In 2018, the New York Court of Appeals held in *People v. Suazo*<sup>328</sup> that “a noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation—i.e., removal from the country—is entitled to a jury trial under the Sixth Amendment.”<sup>329</sup> The court based its reasoning in part on the severity of deportation, which itself often involves a period of incarceration and often results in permanent physical separation from family and loved ones.<sup>330</sup> At least one other court has come to a similar conclusion.<sup>331</sup> Other courts to consider these issues have taken a different approach.<sup>332</sup>

One scholar has advocated expanding the jury trial right to all civil immigration cases, too.<sup>333</sup> This likewise could confer greater democratic legitimacy on the immigration system and put difficult questions about who should stay and who should be deported in front of a deliberative body that specializes in individualized, equitable decisions. However, expanding the jury trial right to immigration cases could be very expensive, and care would need to be taken so that juries do not discriminate against noncitizen litigants.

## 2. Transparency of Public Sphere and Fully Informed Deliberations

Effective public deliberations relating to jury trials require transparency.<sup>334</sup> Although criminal jury trials are rare, those who witness the trial—either in person or through the use of technology—are still able to both experience it and learn from it.<sup>335</sup> Watching the trial is an important civic act because it imparts understanding of the complexities

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maximum penalty of six months in jail or less). In contrast, some states, like Texas, provide a jury trial right for all misdemeanors. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 33.01(b) (West 2019).

327. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968)).

328. 118 N.E.3d 168 (2018).

329. *Id.* at 171.

330. *See id.* at 176.

331. *See Bado v. United States*, 186 A.3d 1243, 1246–47 (D.C. Cir. 2018) (en banc).

332. *See* Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 5 & n.13, 6 & n.14 (2019) (collecting cases where courts have diverged on whether a noncitizen defendant is entitled to a jury trial).

333. *See generally* Daniel I. Morales, *It's Time for an Immigration Jury*, 108 NW. U. L. REV. COLLOQUY 36 (2013) (proposing that all cases involving the status of illegal immigrants be decided by a jury). For an interesting proposal relating to citizen participation and gun control, see Robert J. Cottrol & Raymond T. Diamond, *In the Civic Republic: Crime, the Inner City, and the Democracy of Arms—Being a Disquisition on the Revival of the Militia at Large*, 45 CONN. L. REV. 1605, 1632–33 (2013).

334. *Cf. supra* Section II.C.5 (discussing transparency and informed deliberations).

335. *See* Simonson, *supra* note 2, at 2179, 2194, 2200, 2209.

of criminal adjudication; this can either foster greater respect for the system or spur activism for reform.<sup>336</sup> These benefits weigh strongly in favor of televising and live-streaming more criminal trials to make this experience available to as many people as possible.<sup>337</sup>

Another issue related to the transparency of the trial is discovery requirements. Just as a lack of transparency in the trial impedes public deliberations about a given case and the system generally, so too do insufficient disclosures between the parties limit the ability of the jury to effectively deliberate about the case.<sup>338</sup> For example, unlike civil litigants, criminal litigants almost never have the opportunity to depose witnesses, which in turn limits the parties' ability to effectively prepare for the trial and make appropriate presentations to the jury.<sup>339</sup> This leaves the jury unable to effectively deliberate.

### 3. Reasoned Deliberations

Effective deliberations should be based on reason and a consideration of all views presented.<sup>340</sup> Trial jurors are instructed to deliberate with each other and are even told how to deliberate with each other,<sup>341</sup> and the system gives great weight and finality to their verdicts. Available evidence indicates that jury deliberations are generally effective though not perfect. One scholar has estimated that juries reach the right conclusion about 90% of the time.<sup>342</sup> Several kinds of problems can beset

336. *See id.* at 2176–77.

337. Likewise, although executions are rare, some states provide a right for certain members of the public to witness them. *See, e.g.,* MO. REV. STAT. § 546.740 (2019).

338. *See* McConkie, *supra* note 21, at 22–23.

339. *See* Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1091–92, 1108–10 (2014).

340. *Cf. supra* Section II.C.6 (discussing the importance of using reason, not emotion or threats, in deliberations).

341. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 15-5.4(a) (AM. BAR ASS'N, 3d ed. 1996) (“Before the jury retires for deliberation, the court may give an instruction which informs the jury: (1) that in order to return a verdict, each juror must agree thereto; (2) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment; (3) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors; (4) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and (5) that no juror should surrender his or her honest belief as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.”).

342. *See* Kenneth S. Klein, *Truth and Legitimacy (in Courts)*, 48 LOY. U. CHI. L.J. 1, 63 (2016) [hereinafter Klein, *Truth and Legitimacy*] (citing Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 310–15, 326–28 (2007)); *id.* at 64 (“There is ample evidence of dissatisfaction with the accuracy of dispute resolution through trial by jury, but there is ambiguity about whether judges are perceived as any better . . . .”); *see also* Paula Hannaford-Agor, *On Second-Guessing Jury Verdicts*, VOIR DIRE, Fall/Winter 2007, at 5

jury deliberations. Sometimes the jury makes unfounded assumptions about the evidence.<sup>343</sup> Sometimes the parties cannot make a full adversarial presentation of the case, either because of insufficient disclosures<sup>344</sup> or under-resourced or incompetent attorneys. Sometimes the jury is confused by the complexity of the evidence, especially in cases involving expert testimony.<sup>345</sup> Sometimes the jurors make false assumptions; for example, jurors are more likely to believe that an eyewitness identification is accurate if the witness who made it has a high level of confidence in the identification.<sup>346</sup> This is in spite of the fact that studies have shown that, where poor lineup procedures are used, eyewitness identification is certainly a poor indicator.<sup>347</sup>

Another criticism of jury deliberations has to do with its gender dynamics. Forepersons, who are uniquely influential, are more likely to be male than female.<sup>348</sup> Most studies of mock juries show that male jurors are much more likely than female jurors to speak up during deliberations.<sup>349</sup> Male jurors, as compared to female jurors, speak longer and more often, and they interrupt other speakers more.<sup>350</sup> This limits the effectiveness of deliberations because not all voices are heard and because the quality of male-dominated deliberations is different. Women are more likely than men to engage in evidence-driven deliberations, which focus on group story construction based on the available evidence, with voting coming at the end.<sup>351</sup> In contrast, men are more likely to engage in verdict-driven discussions, which begin with public voting

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(critiquing Spencer's article); Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1097–98 (2013) [hereinafter Klein, *Why Federal Rule*] (arguing that the drafters of the Constitution entrusted trials to juries despite being aware of juries' weaknesses).

343. See, e.g., *supra* Section III.A (discussing jury racism).

344. See McConkie, *supra* note 21, at 35–38.

345. See Goldbach & Hans, *supra* note 291, at 2717.

346. *Id.* at 2720.

347. See John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCHOL. SCI. PUB. INT. 10, 14–17 (2017) (analyzing how varying conditions in police lineups can effect the accuracy of witness identification); *Eyewitness Identification Reform*, INNOCENCE PROJECT, <https://www.innocenceproject.org/eyewitness-identification-reform/> [<https://perma.cc/S3ZY-LC5L>].

348. Erin York Cornwell & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 LAW & SOC'Y REV. 667, 671 (2011); Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 595 (1987); see also Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. REV. 789, 812 (2015) (noting that status differences can affect jury deliberations).

349. See Marder, *supra* note 349, at 596.

350. *Id.* at 597.

351. See *id.* at 603.

early in the process and focus on preferred outcomes.<sup>352</sup> Evidence-driven deliberations are more likely to produce accurate decisions.<sup>353</sup> A male-dominated jury with minimal female voices is also, in a sense, a smaller jury, which dilutes the promised protection of the beyond a reasonable doubt standard.<sup>354</sup> Courts can address this gender imbalance throughout the trial by educating juries about gender dynamics, providing specific instructions about how to deliberate, and encouraging women to do more speaking and men to do more listening.<sup>355</sup>

In spite of all this, the 10% error rate shows that juries usually get it right. That rate is worse than the best estimates of the average error rates in plea bargaining, which have been put at somewhere between 2% and 8%,<sup>356</sup> but plea-bargained cases may generally be more clear cut than those more contested cases that go to jury trial. Juries have certain strengths: they are good at recalling facts and pooling collective knowledge,<sup>357</sup> and they are generally able to understand and apply the instructions at the end of the case.<sup>358</sup> Additionally, “[s]tudies indicate that lay participants are able to understand complex issues and often match judges in the accuracy of their decisions.”<sup>359</sup> Finally, it is worth bearing in mind that jury error rates are very difficult to calculate because reasonable people can often disagree over the right verdict.<sup>360</sup>

Many proposed reforms could improve jury deliberations and their accuracy.<sup>361</sup> First, there is evidence that juries would benefit from more expert guidance. Two centuries ago, American judges used to give the jury, at the end of the parties’ cases, a summary of and commentary about the evidence.<sup>362</sup> This practice has long since fallen out of favor but may be a good way for juries to benefit from some expert evaluation of the

352. *See id.*

353. *See id.* at 604.

354. *See id.* at 600.

355. *Id.* at 606–07.

356. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/8KDQ-ST8E>]. *See generally* Brian H. Bornstein, *Judges v. Juries*, 43 CT. REV. 56 (2006) (discussing error rates of jury trials and bench trials).

357. *See* Marder & Hans, *supra* note 348, at 799.

358. Shari Seidman Diamond et al., *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1594, 1605 (2012).

359. Goldbach & Hans, *supra* note 291, at 2724.

360. *See* Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 853 (2015) (“[D]efining a ‘right’ or factually accurate verdict may be complex.”).

361. *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xx–xxi (2015) (arguing for several reforms, including videotaping juror deliberations and making the tape available to researchers).

362. *See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 454 (2013).

case without taking away their ability to decide it.<sup>363</sup> Second, “studies show that reforms . . . such as allowing note taking, asking questions, mid-trial deliberations, and the use of notebooks to organize the evidence, can increase the quality of lay citizen fact finding.”<sup>364</sup> Third, jurors could be given plain English jury instructions before opening statements instead of after closing arguments.<sup>365</sup>

Assuming the jury is sufficiently representative and receives proper guidance and assistance from the court in its deliberations, there is a quality in its deliberations that decision makers cannot replicate. “Whether parsing a factual question, seeking to apply a legal standard as instructed, or engaging in an act of nullification, ordinary citizens serving as jurors engage in unique acts of interpretation, redefining the very concept of the law in terms of their own lived experiences and expectations.”<sup>366</sup> Juries specialize in “concrete ethical [and] other practical valuations.”<sup>367</sup> They need guidance and constraints to work well, but they can indeed represent the people and deliberate in the kinds of decisions that cannot be reduced solely to technical or scientific judgment.

#### 4. Jury Unanimity

Unlike most democratic decisions, which are made by majority rule, in the federal system and virtually every state, jury verdicts must be unanimous.<sup>368</sup> However, in the 1972 case *Apodaca v. Oregon*,<sup>369</sup> the Supreme Court held that the Sixth Amendment jury right, as incorporated by the Fourteenth Amendment, does not require unanimity.<sup>370</sup> Recently,

363. *Id.* at 454. It is also argued that limiting instructions, though widely assumed to be ineffective, may in fact assist the jury’s deliberations under certain conditions. *Id.* at 422–24.

364. Goldbach & Hans, *supra* note 291, at 2724; see Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge’s View*, 48 ARIZ. ST. L.J. 481, 510–15 (2016) (discussing jury note-taking and allowing jurors to ask questions). See generally NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES* (2007) (providing a comprehensive assessment of the American jury system).

365. See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 451, 498 (2006).

366. Carroll, *supra* note 360, at 827.

367. Kleinfeld, *supra* note 31, at 1381 (quoting WEBER, *supra* note 43, at 891, 976).

368. *Cf. supra* Section II.C.7 (discussing public consensus).

369. 406 U.S. 404 (1972).

370. *Id.* at 406, 410 (noting that “the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen” and holding that unanimity “does not materially contribute to the exercise of this commonsense judgment” (quoting *Williams v. Florida*, 399 U.S. 78, 100 (1970))). But see *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting) (“I think the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict.”).

the Supreme Court decided the case of *Ramos v. Louisiana*.<sup>371</sup> The jury in Ramos's case had convicted him on a 10–2 vote of second-degree murder after about two hours of deliberation, and Ramos was sentenced to life in prison without the possibility of parole.<sup>372</sup> The Supreme Court reversed *Apodaca* and held that the jury unanimity requirement was incorporated under the Fourteenth Amendment and “applied to state and federal criminal trials equally.”<sup>373</sup> The *Ramos* Court unsurprisingly framed its decision in terms of constitutional issues: the original meaning of the jury trial guarantee, the incorporation debate, and stare decisis. But *Ramos* also paid some attention to membership and deliberation.

As for membership, the Court acknowledged that the state law provision allowing nonunanimous verdicts was passed in the Jim Crow era to diminish the influence of Black jurors.<sup>374</sup> In her concurrence, Justice Sotomayor wrote that the 1898 Louisiana state constitutional convention “approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service.”<sup>375</sup> If ten jurors decide to ignore the other two, this effectively diminishes the voting power of those two jurors (especially if they are racial minorities) because their vote is not needed to convict; if the two dissenting jurors are marginalized because of their race, their membership is devalued.<sup>376</sup>

As for deliberation, the *Ramos* court paid some attention to how the unanimity requirement might affect case outcomes.<sup>377</sup> Admitting that the unanimity requirement made hung juries more likely, the majority argued that hung juries might simply be an example of a jury doing exactly as it should: “[D]eliberating carefully and safeguarding against overzealous prosecutions.”<sup>378</sup> The court, citing five studies, asked: “And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries? Or the fact that others profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough

371. 140 S. Ct. 1390 (2020).

372. See Brief for Petitioner at 11–12, *Ramos v. Louisiana*, 139 S. Ct. 1318 (2019) (No. 18-5924), 2019 WL 2451204, at \*11.

373. *Ramos*, 140 S. Ct. at 1397.

374. *Id.* at 1394; see also Aliza B. Kaplan & Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 43 (2016) (noting that Oregon's nonunanimous jury rule was adopted to silence the views of minorities).

375. *Ramos*, 140 S. Ct. at 1417 (Sotomayor, J., concurring).

376. The *Apodaca* Court rejected the argument that unanimity was necessary to protect the cross-section of the community requirement. *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972).

377. *Ramos*, 140 S. Ct. at 1401.

378. *Id.*

deliberations?”<sup>379</sup> A jury that can convict on a 10–2 vote need not necessarily deliberate as much or as well as a jury that needs all twelve votes to convict; unanimity encourages better and more inclusive deliberations.

This Article’s objection to nonunanimous verdicts assumes that the attorneys have peremptory challenges, which often operate to remove prospective jurors with diverse perspectives from the venire.<sup>380</sup> This magnifies the importance of the remaining diverse jurors to have a voice, a voice that unanimous verdicts would preserve. However, if peremptory challenges were curtailed or abolished, it might make more sense for the Constitution to allow nonunanimous verdicts. Regardless of how this debate is resolved, the key theoretical insight is that unanimity rules must carefully weigh the principles of equal membership and effective deliberations.

### C. Participation

The final ideal of the citizenship triad to be applied to jury trials is participation. Although jury trials are rare, “[m]ore than one-third of eligible Americans will serve as a juror at least once in their lifetime.”<sup>381</sup> The Supreme Court recently recognized that “[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.”<sup>382</sup> As such, apart from benefiting defendants, jury trial service can provide certain benefits for the people as a whole.

Jury service educates and empowers the people. It teaches them hands-on about their own laws and government.<sup>383</sup> As Tocqueville famously observed,

The jury, and more especially the civil jury, . . . is the soundest preparation for free institutions. . . .

It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights . . . and becomes practically acquainted with the laws . . . .<sup>384</sup>

379. *Id.* But see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189–91 (1995) (arguing for a supermajority rule to take the place of unanimity in creating more diverse juries and preventing peremptory challenges).

380. See discussion *supra* Section III.A.

381. Klein, *Truth and Legitimacy*, *supra* note 342, at 65.

382. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019).

383. See Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1136–37, 1157 (2014).

384. Amar, *supra* note 320, at 1186 (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295–96 (Vintage ed. 1945) (1835)).



In that same vein, one Anti-Federalist essayist wrote in 1789 that even though many ordinary people were “much degraded in the powers of the mind,” jury service could enlighten them: “Give them power and they will find understanding to use it.”<sup>385</sup>

In modern times, jury service still brings a wide range of social benefits. It requires people to work together for a common purpose. In the course of their service, jurors may develop long-term social connections with their neighbors and they may learn or refine social skills that are helpful in other social contexts.<sup>386</sup> People who have served on a jury are also more likely to vote.<sup>387</sup>

Other reforms are necessary to allow more people to participate in jury service. Of the many ways that people participate in criminal justice citizenship (e.g., voting, protesting, working in politics, serving on a community advisory board), most of them are voluntary. Unusual among rights,<sup>388</sup> jury service (like some military service) is compulsory. Citizens are compensated monetarily only in a very small measure for their time.<sup>389</sup> Not surprisingly, this service requires more of a sacrifice than most people feel they can make.<sup>390</sup> Nevertheless, in light of the benefits of jury service, one author has called for one week of paid, mandatory jury duty per citizen per year, with government-provided childcare.<sup>391</sup>

Other proposals have been put forth to reduce the burden of jury service. For example, one judge proposed more efficient management of the trial, including reducing “unnecessary, cumulative, and excessive evidence,” eliminating party-requested sidebars, using technology to streamline voir dire, putting “hard time limits” on opening statements and closing arguments, and careful planning in the final pretrial conference.<sup>392</sup>

385. *Id.* at 1187 (emphasis omitted) (quoting *Essays by a Farmer* (IV), in 5 THE COMPLETE ANTI-FEDERALIST 39 (Herbert J. Storing ed., 1981) (1789)).

386. FERGUSON, *supra* note 8, at 75–76.

387. Goldbach & Hans, *supra* note 291, at 2720–21.

388. Peter H. Schuck, *Three Models of Citizenship*, in CITIZENSHIP IN AMERICA AND EUROPE 151, 153 (Michael S. Greve & Michael Zöller eds., 2009) (calling jury duty “a right of democratic participation in self-governance”).

389. Federal trial jurors are paid \$50 per day for the first week and up to \$60 per day after serving ten days. *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> [<https://perma.cc/FYG9-WURQ>]. Philadelphia jurors are paid \$9 a day for the first three days and \$25 a day thereafter. Lucia Geng, *Why Pennsylvania Jury Duty Pays \$9 Per Day*, PHILA. INQUIRER (Aug. 26, 2019, 10:35 AM), <https://www.inquirer.com/news/pennsylvania/jury-duty-pay-pennsylvania-curious-philly-20190826.html> [<https://perma.cc/HWY8-JSJA>].

390. See Nancy S. Marder, *Expanding the Jury: A Provocative Proposal*, 35 CRIM. JUST. ETHICS 68, 74–75 (2016) (reviewing APPLEMAN, *supra* note 8).

391. Amar, *supra* note 320, at 1178–79.

392. Bennett, *supra* note 364, at 493–99.

A key issue about juries is whether they do their job well. Criminal justice citizenship is not served merely by having more people participate in juries because if juries do not reach correct outcomes, membership concerns, such as equality, solidarity, and legitimacy, are defeated. True, popular participation has some value of its own,<sup>393</sup> but not enough to justify, for example, racially determined or otherwise arbitrary outcomes.<sup>394</sup> Ideally, society would reap the benefits of a jury-based system while still providing fair and accurate trials. This Article has already discussed the racial composition of juries above in Section III.A. and the effectiveness of jury deliberations in Section III.B. This Article now turns to the problem of giving trial juries a role to which they are well-suited.

The role of modern juries has changed. At the Founding, jury decisions were more normative than legal.<sup>395</sup> There were no structured criminal codes to interpret and apply.<sup>396</sup> Juries kept the peace in a “communal legal culture” of well-known substantive criminal laws.<sup>397</sup> They determined criminal culpability based on moral blameworthiness instead of the more technical modern definitions.<sup>398</sup> This is not to idealize the past, but only to say that modern trial juries, in contrast, mostly apply technical law to facts and have little room for equitable discretion.<sup>399</sup> Within proper bounds, a jury might be ideally suited to apply equitable discretion. “[L]aypeople are particularly good at desert judgments” dealing with “[q]uestions of proportionality, blameworthiness, and social responsibility.”<sup>400</sup>

Some scholars have proposed that nullification is an appropriate use of jury discretion.<sup>401</sup> Stated very simply, nullification occurs when “jurors refuse to apply the law to a given set of facts.”<sup>402</sup> This raises serious rule-

393. See *supra* Section II.B.

394. See Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1668 (2017) (applying this reasoning to jury nullification, which may correct normative injustice at the expense of sullyng the law).

395. *Id.* at 1660.

396. *Id.*

397. *Id.* at 1660–61 (quoting Jessica K. Lowe, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 LAW & SOC. INQUIRY 788, 793 (2011) (book review)).

398. *Id.* at 1661.

399. See *id.* at 1662. Equitable discretion has been defined as “a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story.” *Id.* at 1665 (quoting Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 92 (1993)).

400. *Id.* at 1666.

401. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

402. Brenner M. Fissell, *Jury Nullification and the Rule of Law*, 19 LEGAL THEORY 217, 218 (2013).

of-law concerns because it allows jurors to ignore duly enacted laws in lieu of their own preferences.<sup>403</sup> In contrast, a jury may properly acquit for interpretive reasons (e.g., jurors could theoretically say “the law as written does not apply here” or even “the law applies by its terms but was not intended to apply to these facts”) or equitable reasons (e.g., when the circumstances of the case counsel for leniency).<sup>404</sup> This is in line with the proposal of the democratizers: the trial jury should “have the right and should be informed of its right to make judgments of both fact and law and to acquit based on an overall equitable judgment regarding the propriety of holding the accused criminally liable.”<sup>405</sup>

This Article has discussed how jury adjudication could strongly support the three pillars of criminal justice citizenship. The converse is also true: the collapse of the jury trial has weakened citizenship. As has been well-documented elsewhere, plea bargaining has supplanted jury trials in the American criminal justice system.<sup>406</sup> In doing so, it has silenced the people’s voice in adjudication and deprived the citizenry of the right to adjudicate and the benefits thereof. Scholars have long advocated that plea bargaining be banned but to no avail.<sup>407</sup> Many reforms to plea bargaining have been proposed, but some are much more supportive of criminal justice citizenship than others. Perhaps the best hope for preserving citizenship in criminal justice is to reform plea bargaining in such a way that citizens still have meaningful ways to participate in criminal adjudication.<sup>408</sup>

### CONCLUSION

The American criminal justice system has a unique history of citizen involvement. That involvement served not only to protect citizens, including the criminally accused, from their own government, but also to ensure that citizens in fact governed themselves. The people’s role in government was meant to be and should remain expansive, and this is all the more true when it comes to criminal justice, where the government’s power to deprive liberty is at its apex.

The principles of membership, deliberation, and participation best define the people’s role in criminal justice. These principles provide a

403. *Id.* at 222; see Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 581 (2014).

404. See Fissell, *supra* note 402, at 217.

405. Kleinfeld et al., *supra* note 52, at 1701.

406. See generally FISHER, *supra* note 15 (describing the demise of the criminal jury trial in the United States and the rise of plea bargaining in its place).

407. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2003 (1992).

408. I intend to address this question in future work. See Daniel S. McConkie, *Plea Bargaining for the People* (unpublished manuscript) (on file with author).

wider perspective of criminal law and procedure than is usually found in legal scholarship. Without a doubt, providing accurate and fair adjudication for the accused is essential. But *who* provides this adjudication matters. To the extent that the people can do it themselves, or at least have a strong voice in it, a host of benefits can be realized, including strengthened solidarity and greater legitimacy in criminal justice.

Of course, popular participation should not work against certain procedural ideals that, while sometimes counter-majoritarian, are necessary for any stable and morally defensible democracy. Those ideals, rooted in the membership concerns outlined above, include providing reasonably accurate results, reducing discrimination and arbitrariness, and promoting a version of criminal justice that attempts to re-stitch torn social fabric instead of just throwing it away. Thus, instead of removing experts from criminal justice, this Article's theory of criminal justice citizenship calls for a close examination of particular features of the system to determine the proper role for lay people and experts. In most cases, justice will be served when they work together, specializing in the tasks they are best suited to handle.

The trial jury provides a great example of an institution that has served America well but needs to be updated to accord with modern understandings of group deliberation, equal protection under the law, and scientific advances. So reformed, juries can continue to provide a way for citizens to resist a complete takeover by the bureaucracy and to govern themselves.